THE BRAILLE MONITOR

INKPRINT EDITION

VOICE OF THE NATIONAL FEDERATION OF THE BLIND

The National Federation of the Blind is not an organization speaking for the blind--it is the blind speaking for themselves

Monitor Headquarters
2652 Shasta Road, Berkeley, California 94708

OCTOBER --- 1966

THE BRAILLE MONITOR

Published monthly in braille and distributed free to the blind by the National Federation of the Blind, President: Jacobus tenBroek.

Inkprint edition produced and distributed by the National Federation of the Blind.

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ALABAMA SCORES NEW GAINS IN BLIND AID

At the 1966 Special Session of the Alabama Legislature the Alabama Federation of the Blind under the presidency of Rogers Smith secured the enactment of SB 56, an amendment to the Aid to the Blind Law in that State which makes it clear that $70 a month is only the minimum amount of aid which must be paid, and that the cost of special needs must be added. Also, the basic amount of $70, being only the minimum, can be increased by the State at any time.

The amendment to the law also provides that "amounts of income and resources shall be exempted as may be authorized by Federal law or regulations." This means that almost automatically the Alabama Bureau of Public Assistance must exempt those things which the Social Security Act and other Federal statutes permit to be disregarded or which are permitted to be exempted by regulations issued in pursuance thereof. Among other things this will exempt the $5 a month of income from any source (or, if such income is from earnings, then a total of $90 a month plus one-half of all earned income exceeding $90); the disregarding of additional income and resources necessary to implement a plan for self-support from 12 months to 36 months; the exemptions under the Economic Opportunity Act; the removal of any limit on the amount of real property which a recipient may own, provided such real property is yielding a return commensurate with its value; and the increase up to $2,000 in the amount of personal property (cash, cash surrender value of insurance, and securities) which a recipient may possess (the new maximum being contained in Federal Handbook Transmittal No. 77).

Since the Alabama Federation began its intensive work to improve the lot of needy blind men and women four short years ago, it has accomplished a very great deal. In February 1962, 1,615 recipients received an average grant of $42.78 a month. In March 1966, 1,868 recipients received an average grant of $66.44 a month. In 1962 a recipient or married couple might own real property of $800 or less, assessed value, less encumbrances; and might have personal property items used in business valued at not more than $400, and livestock and poultry used for home consumption up to $200 net value. Today, there is no limit on the value of the home; other real property of $5,000 net assessed value may be retained if producing an income reasonably consistent with its value; and up to $1,200 per recipient in personal property, not counting the value of a motor vehicle used for transportation nor the value of any personal effects. Under the recent amendment, these property limitations will be still further liberalized

The MONITOR commends President Rogers Smith and the Ala-

bama Federation of the Blind on its tremendous success in improving Aid to the Blind in that State. It also commends Perry Sundquist, long-time consultant to the NFB in welfare matters, for the knowledge and experience which he has placed at the disposal of the Alabama affiliate in achieving that success.

A CHIP OF HER TOOTH RESTORES SIGHT TO BLIND WOMAN

By Richard Murray

(From the National Enquirer)

Agnes Arthur live in darkness for 17 years -- because doctors couldn't cure her serious eye disease. But science finally found the answer to her problem -- right in her own mouth.

For a team of surgeons in Glasgow, Scotland, tried an amazing medical technique which had never been performed successfully before. They pulled one of her teeth, took a chip from it and cut out its center -- and after fitting a tiny plastic window into the opening, inserted the piece of tooth in a slit cut in her eye.

The operation worked -- and now Agnes has partial, cloudy vision in her left eye. And a simple cataract operation should clear this up -- and give her normal left eye vision.

Agnes, 27, was born with keratitis, a disease of the cornea in both eyes. As the years passed Agnes kept seeing eye specialists, but none offered her any hope until she met Dr. R. J. McWilliam, chief surgeon at the Glasgow Eye Infirmary.

Although nine such operations performed in London, Rome and Barcelona had only met with partial success, Dr. McWilliam realized it was the only chance to give Agnes sight. He explained: "medical experiments along this line had been going on for years. At first, all sorts of things were tried as frames to hold the window, but the body rejected them as foreign matter. Finally thin sliver of teeth were used and although success was only partial, it was apparent that such slivers could be used as the frame. For the eye doesn't rejct a sliver of the patient's own teeth, as it does foreign matter."

After discussing the idea with ophthalmic surgeons and dental surgeons, Dr. McWilliam decided that the chance of success was high. So he suggested it to Agnes last September. McWilliam and fellow surgeons spent two months planning the operation. Finally, Agnes was wheeled into an operating room on November 25.

The first step of the operation began when a dental surgeon extracted a tooth intact from the upper right side of Agnes' mouth. A diamond cutter was then used to slice several cross-sections of tooth to a thickness of just two-tenths of a millimeter. Then a tiny, 2-millimeter drill was used to bore out the center of the sliver which was cut three-eighths of an inch in diameter.

While dental surgeons carefully prepared the piece of tooth, surgeons prepared the patient's left eye. The most difficult part of the operation was the filling of the hole in the tooth disc with acrylic perspex, a clear plastic. The fitting had to be perfect. The final step was to slip the "new eye" into the slit in the cornea. Then seven stiches were required to close the cut. For the next two days Agnes lay in darkness. Then the thick pad which protected her eye was removed. Agnes could make out the figures standing around her bedside. Dr. McWilliam termed the operation a complete success.

HOWARD BROWN RICKARD SCHOLARSHIPS AWARDED

Four scholarships have been awarded by the National Federation of the Blind ranging from $250.00 to $500.00 for the 1966-67 academic year. These Howard Brown Rickard Scholarships were established by a bequest in the will of Thomas E. Rickard and are limited, by the terms of the bequest, to blind students in the professions of Law, Medicine, Engineering, Architecture and the Natural Sciences. This year's recipients are Lawrence E. Tittle of Independence, Missouri; Alan L. Spielman of Atlantic City, New Jersey; Abed Budair of Bethlehem, Jordon; and Walter G. Jacobs of New Brunswick, New Jersey.

Larry Tittle, age 34, is a student at the University of Missouri, School of Law, Kansas City, from which he expects to graduate in 1967. Larry is married and has three children. Prior to enrollment in Law School, he attended the Missouri State College at Warrensburg.

Walter Jacobs is a graduate student in ceramics engineering at

Rutgers University from which he also received his B.S. in June of 1965. Ceramics engineering is a space age profession with great potential, and as far as we know, Walter is the first blind person to enter this highly specialized field. Walter is 27 years old and, in addition to his studies, has had time to acquire a wife and three daughters.

Abed Budair is a young Jordanian blind man, who is now completing his apprenticeship as an attorney in Bethlehem. He has been admitted to the University of Wisconsin and the scholarship from the Federation will be combined with those from several other organizations to finance a year's graduate work in this country. Long-time MONITOR readers will remember that the organized blind of the United States have helped Abed from time to time during earlier stages of his studies carried on in the Middle East. As far as we know, he is the first blind person in the Arab world to complete law school.

Alan L. Spielman, youngest of the group at age 23, is also planning to engage in the profession of law. He has completed two years of law school at the University of Pennsylvania and has been working this summer for a Philadelphia law firm. He hopes to specialize in appellate practice. His undergraduate work was at Swarthmore College, from which he graduated with high honors in 1964.

STATE SUPREME COURT TO HEAR PARRISH CASE

The California Supreme Court has voted to review the District Court of Appeals' denial of Benny Parrish's petition to be reinstated as a social worker. And, since the District Court rendered its May 31 decision, the Federal Department of Health, Education and Welfare has issued regulations that may be helpful to Parrish's position.

MONITOR readers will recall that Benny Parrish refused to participate in the mass "bed-check" raid on recipients of Aid to Families with Dependent Children by the Alameda (California) County Department of Welfare in January 1963. As a result he was fired as a caseworker for "insubordination."

Arguing that the order directing caseworkers to take part in the surprise raid "for the primary purpose of securing evidence of the crime of fraud violated the constitutional guarantees of the Fourth and Fourteenth Amendments," Parrish first took his appeal before the Superior Court,

where it was denied, and then before the District Court which upheld the lower court's decision.

Although actual data shows only an extremely small percentage of clients guilty of welfare fraud, the District Court concluded, " We see nothing wrong with making weekend eligibility calls which experience has demonstrated disclose widespread faudulent misappropriation of public funds and the deprivation of the children for whose benefit the ANC [Aid to Needy Children] program was instituted."

It was also the District Court's opinion that the Fourth and Fourteenth Amendments were not violated as clients consented to the search when confronted by caseworkers. The Court did not discuss the clients' fear of the termination of benefits if they did not let caseworkers into their homes and therefore, the question whether consent was freely and voluntarily given. Parrish's lawyers (Albert M. Bendich and Coleman A. Blease) argue, "[C]onsent is irrelevant in that it cannot provide constitutional justification for an unconstitutional assertion of power."

While the District Court of Appeals of California may see nothing wrong with "night raids," the Federal Department of Health, Education and Welfare does. In new regulations [discussed in August 1966 MONITOR] dated March 18, 1966 (Handbook Transmittal No. 77) to which all states must conform by July 1, 1967 or jeopardize the receipt of millions of dollars in federal funds, HEW prohibits, "a State plan containing policies and procedures for determination of eligibility that will result in violation of privacy or personal dignity, that constitute harassment, or that violate constitutional rights. . . ."

Specifically, HEW warns, "[T]he State must especially guard against violations in such areas as. . .making home visits outside of working hours; and searching in the home, for example, in rooms, closets, drawers, or papers, to seek clues to possible deception."

Consistent with Benny Parrish's petition, the HEW Handbook reasons that "the objectives of the program can only be achieved through an agency-client relationship based on mutual respect."

While these requirements on the states for federal financial participation in public assistance payments do not become effective until next year, no state can let stand a court decision such as that of the California District Court of Appeals which sees "nothing inherently wrong with making weekend calls." To do so would risk the discontinuance of the much needed federal funds.

Still, Handbook Transmittal No. 77 is only a statement of the federal government's policy. It does not answer whether a surprise night raid order is constitutional, or whether government employees may be fired for "insubordination" if they refuse to carry out unconstitutional orders. These answers must come from the Supreme Court, but presumably the Court will have one eye on the position of the federal government now so emphatically expressed in the regulation.

Contributions to help defray expenses in this continuing crusade may be sent to the Benny Parrish Defense Fund in care of the MONITOR.

NEW YORK STATE CONVENTION

The eleventh annual convention of the Empire State Association of the Blind was held at the Hotel Lafayette in Buffalo over the Labor Day weekend, September 2-5. The Board met Friday evening and the convention officially opened 10 a.m. Saturday. A hospitality room was maintained Friday through Monday.

The highlight of the convention was the banquet which was held on Saturday evening. Ken Jernigan gave a very fine address as the banquet speaker. During the convention, at the request of the various chairmen, Ken sat in on several committee meetings where his welcome advice proved to be very helpful.

In addition to the usual business meetings there was a boat ride on Lake Erie Sunday night. There was also a community breakfast Sunday morning.

Ruth Revacant, president of the Buffalo Chapter of E.S.A.B., was assisted by Red Lawman and Al Czsoek in planning this convention.

The 1967 E.S.A.B. Convention will meet next Labor Day weekend in New York City.

MAN OF 86 INVENTS COLLAPSIBLE CRUTCH

By Stacy V. Jones

(From The New York Times, September 17, 1966)

A retired New York manufacturer, who at 86 suffers from arthritis and weak knees, has invented a collapsible crutch that, he says, enables the user to walk up and down stairs with both hands free. Patent 3,272,210 was granted this week to Otto Boruvka, a World War I veteran.

The crutch is jointed at hip and knee, and has a tip that fits into a heel clamp attached to the shoe. It may be worn inside or outside the coat and trousers.

Mr. Boruvka refers to the joints in his tubular crutch as an artificial knee and hip. To sit down with the crutch still under his shoulder, the user unlocks the joints by pulling a handle. When he stands up, they lock again automatically.

The patent covers also a straight, noncollapsible form. As this too has a tip fitting into a heel clamp, Mr. Boruvka says, it leaves the hands free in walking.

In 1958, after a bout with back trouble, he patented a trouser remover, which made it unnecessary to stoop over. Aside from few he made for his friends, the device has not reached production.

Now recovering from a cataract operation, he is working on another invention.

NEW REHABILITATION FIGURES RELEASED

[Editor's note: The new figures released by the Department of Health, Education and Welfare, and summarized below, show a steady rise in the total number of disabled persons rehabilitated each year. Such increases obviously must be welcomed by the disabled. This is true although the question might reasonably be raised whether the total amount of national resources devoted to the rehabilitation of the disabled is yet adequate to keep up with the annual additions to the disabled population, let

alone to reduce the cumulated masses of disabled persons in the United States -- variously estimated at from 4 to 5 million. The figures presented, too, are in the gross. A great deal of additional information will be needed before we can know the types and severity of disablement involved, the employments engaged in by the disabled and the amount of their compensation. In 1963, according to figures released by HEW, one out of three of the blind persons rehabilitated was placed in a sheltered workshop or became a homemaker or an unpaid family worker.]

Secretary of Health, Education and Welfare John W. Gardner announced that more than 154,000 disabled men and women were rehabilitated for jobs during the year ended June 30, 1966, under the Federal-State program administered by the Vocational Rehabilitation Administration. He noted that this is a new record and an increase of 14 percent over the previous year's total of 134,859.

For the fifth year in succession, Pennsylvania led the Nation in number of physically or mentally handicapped persons rehabilitated, with 12,338. New York was second, with 9,512; North Carolina third, with 9,184; Illinois fourth, with 8,302; and Georgia fifth, with 8,009.

In number rehabilitated per 100,000 population, West Virginia ranked first, with 222, as compared with a national average of 78; the District of Columbia was second, with 217; North Carolina and Arkansas was tied for third, with 187; and Georgia was fifth, with 184.

Vocational Rehabilitation Performance by State, Fiscal Years 1966 and 1965

State	Rehabilitated Clients						
	FY 1966			FY 1965			
	Number	Rate Per 100,000 pop. a/	Rank Based on Rate	Number	Rate Per 100,000 pop. a/	Rank Based on Rate	Percent Change, FY 1966 over FY 1965
Total. . .	154,279	78	--	134,859	70	--	+14
Alabama	3,988	115	12	3,742	110	11	+ 7
Alaska	82	32	53	101	40	47	-19
Arizona	841	52	42	653	41	45	+29
Arkansas	3,663	187	4	3,153	163	6	+16
California	4,522	24	54	3,461	19	54	+31
Colorado	1,955	99	18	1,585	81	18	+23

Vocational Rehabilitation Performance, continued:

State	Rehabilitated Clients						
	FY 1966			FY 1965			
	Number	Rate Per 100,000 pop. a/	Rank Based on Rate	Number	Rate Per 100,000 pop. a/	Rank Based on Rate	Percent Change, FY 1966 over FY 1965
Connecticut	1,325	47	44	1,084	39	48	+22
Delaware	668	132	10	622	127	9	+ 7
Dist. of Col.	1,742	217	2	1,441	178	2	+21
Florida	7,067	122	11	6,153	108	12	+15
Georgia	8,009	184	5	7,221	168	5	+11
Guam	27	36	50	20	29	51	+35
Hawaii	420	59	34	392	56	28	+ 7
Idaho	525	76	27	403	58	26	+30
Illinois	8,302	78	26	6,011	57	27	+38
Indiana	1,874	38	49	1,742	36	49	+ 8
Iowa	1,530	55	39	1,305	47	38	+17
Kansas	1,063	48	43	917	41	46	+16
Kentucky	4,365	137	8	4,144	131	8	+ 5
Louisiana	2,764	78	25	2,349	68	24	+18
Maine	462	47	45	462	47	39	--
Maryland	3,361	95	19	2,410	70	21	+39
Massachusetts	3,012	56	38	2,475	46	41	+22
Michigan	5,109	62	32	4,412	54	29	+16
Minnesota	2,210	62	31	1,842	52	32	+20
Mississippi	1,861	80	23	1,838	79	20	+ 1
Missouri	3,820	85	20	3,015	68	23	+27
Montana	564	80	24	576	82	17	- 2
Nebraska	919	62	30	806	54	30	+14
Nevada	196	45	47	109	27	53	+80
N. Hampshire	220	33	52	199	30	50	+11
New Jersey	4,110	61	33	3,473	52	34	+18
New Mexico	476	46	46	463	46	43	+ 3
New York	9,512	53	41	9,067	51	35	+ 5
N. Carolina	9,184	187	3	8,545	176	3	+ 7
N. Dakota	376	58	37	337	52	33	+12
Ohio	3,435	34	51	2,947	29	52	+17
Oklahoma	2,700	109	14	2,404	98	13	+12
Oregon	1,095	58	36	993	53	31	+10
Pennsylvania	12,338	107	16	12,794	112	10	- 4
Puerto Rico	2,136	81	22	1,685	65	25	+27
Rhode Island	1,545	173	6	1,579	173	4	- 2
S. Carolina	4,285	169	7	3,725	146	7	+15

Vocational Rehabilitation Performance, continued:

State	Rehabilitated Clients						
	FY 1966			FY 1965			
	Number	Rate Per 100,000 pop. a/	Rank Based on Rate	Number	Rate Per 100,000 pop. a/	Rank Based on Rate	Percent Change. FY 1966 over FY 1965
S. Dakota	389	55	40	343	48	37	+13
Tennessee	3,970	103	17	3,370	89	15	+18
Texas	6,104	58	35	4,850	47	40	+26
Utah	822	83	21	675	68	22	+22
Vermont	255	64	29	204	50	36	+25
Virginia	4,806	108	15	4,107	94	14	+17
Virgin Islands	58	135	9	36	88	16	+61
Washington	1,330	44	48	1,255	42	44	+ 6
West Virginia	4,029	222	1	3,913	218	1	+ 3
Wisconsin	4,608	111	13	3,293	80	19	+40
Wyoming	250	74	28	158	46	42	+58

a/ Rate is rounded to nearest whole number, based on the estimated total population as of July 1, for each fiscal year. Bureau of the Census, Series P-25.

Prepared by: Division of Statistics and Studies
Vocational Rehabilitation Administration
August, 1966

MUSKEGON SCHOOLS HIRE BLIND TEACHERS

By Mart Tardani

(From the Muskegon, Michigan, Chronicle)

You might say Bill Kapler went out the same way he came in.

Bill's first client when he reported in as the Muskegon YMCA's health service director was Herman Grossman, prominent Muskegon businessman.

Kapler ended his work at the 'Y' to accept a new responsiblity as a Physical Education and English teacher at Sacred Heart School, Muskegon

Heights.

"I'll miss all the wonderful people I've met here, but I feel I can be of greater service teaching children," the blind 24-year-old said.

He'll instruct grades 4 to 8 in phys. ed. and will be correcting some 80 English papers of his students in grades 7 and 8.

"We are pleased to have Bill join our faculty," the Rev. Msgr. Albert A. Kehren, pastor of Sacred Heart, smiled. "I know he will do an outstanding job here."

The two should get along marvelously. Both are avid sports fans with Kapler, the subject of a recent Chronicle feature, regarded as the No. 1 Detroit Tiger fan in the community.

A graduate of Upper Iowa College, Fayette, Iowa, Bill took a two-year course, specializing in the Russian language, at Georgetown University, Washington, D. C., before coming here in January.

He will not be alone in resuming his chosen work. Miss Evelyn Weckerly, who also cannot see, has joined the Mona Shores staff as an English teacher for grades 9 and 10.

"My goal is to get six persons like myself working here in the next year," states Kapler. "I want to prove to the community there are capable blind people in many fields."

Bill put away his miracle oils and his equipment after working on his last client Tuesday afternoon. On the table was the same Herman Grossman.

COOPERATION OF THE EUROPEAN

AID-AGENCIES FOR THE BLIND IN ISRAEL

By Dr. Horst Geissler

Representatives from Germany, France and Switzerland of the associations the aim of which is the aid for the blind in Israel had under the chairmanship of Dr. Prijs their first meeting on the 20.6.1966 in

Basle. Besides many well-known personalities there were Dr. Blum/Saarbrucken, Madame Kahn-Geismar/Colmar and Dr. Guggenheim/Basel. All attendants showed the honest will to help where help must be. Thus the discussions took place in an agreeable, friendly way.

The aim of this first meeting was to coordinate the aid for the blind in Israel to get to the highest degree of effectiveness.

The representatives of the German organization for the aid for blind in Israel just founded in April this year wanted to get some information about the experiences of the other organizations working since many years on this field. Another important result of this meeting was the exchange of informations about the existing institutions and projects in Israel. Between the Israelis and the European institutions and organizations for the blind there have been existing -- often since many years ago -- multiple relations. The self-aid organization founded in Israel "Scheschet" is corresponding with the German association for the blind in Israel.

The exchange of experiences and opinions in Basle was so successful that the attendants decided to meet again in the near future -- probably in France -- to enlarge and deepen the co-operation in the behalf of the blind of Israel.

GLOBAL AID FOR DISABLED

By Howard A. Rusk, M.D.

(From The N.Y. Times, Sept. 18, 1966)

The 10th world congress of the International Society for Rehabilitation of the Disabled held in Wiesbaden, Germany, last week dramatically illustrated the worldwide growth of professional, voluntary and governmental interest in rehabilitation over the last 15 years. There were more than 2,500 delegates from 61 nations and scores of exhibits that included the most up-to-date audiovisual techniques, matching in technical excellence any similar exhibits anywhere.

The growth was also reflected in the quality of the scientific program. The papers were concerned with such diverse, sophisticated problems and techniques as perceptual problems in cerebral palsy, telemetering of physiological data from disabled persons actually at work, and nerve grafting in patients disabled from leprosy.

Particularly encouraging were reports on research projects in India, Pakistan, Poland, Yugoslavia, Israel and Egypt sponsored by the United States Vocational Rehabilitation Administration. These are projects financed by United States funds accrued to our Government from sales of surplus United States agricultural products.

Since this program began six years ago there have been 89 such projects in nine nations. A number have produced findings of direct value to improving services in the United States.

Currently five U. S. universities are conducting research on the immediate postoperative fitting of artificial limbs based on results of a project sponsored by the Vocational Rehabilitation Administration in Poland. This method reduces hospitalization time by one half. It also greatly minimizes postoperative pain and makes training in the use of the prosthesis much easier.

Other studies of methods of cardiac rehabilitation in Yugoslavia and Israel are also proving most useful to researchers. Under the program, frozen blood samples of individuals who have suffered heart attacks and strokes and those of his family are being flown to the United States for analysis and comparison with similar samples of American patients and their families.

Full membership in the society was voted for organizations from Hong Kong, Ethiopia and Iceland.

Associate membership was given to Al Kafat Lebanon. Al Kafat is the Arabic translation of the word "abilities." Its program is based on that of Abilities, Inc., the highly successful factory at Albertson, N. Y., which employs only disabled workers.

The admission of these new affiliates brings membership in the society to 116 organizations in 61 nations compared with 11 organizations in 11 nations 17 years ago.

Since the world congress of 1951 in Stockholm international rehabilitation of the disabled has become of age. The term "rehabilitation" then connoted services for persons with orthopedic disabilities. Since then the rehabilitation concept has been extended to include persons with disabilities resulting from heart disease, mental illness, cancer, neurological problems, arthritis, mental retardation and other disabling conditions.

SKINNER FOUNDATION DISSOLVED

"[Y]ou were instrumental in helping me get part of my education, which after all made writing as a medium of expression possible for me."

The author of this letter was a blind graduate student helped over some financial rough spots by the Skinner Foundation so that he could continue his studies at Oxford and Harvard. The occasion was the publication of his first book by a leading New York company. In the years since the Foundation was first formed, Elmer and Leona Skinner have often received such letters. Now, after more than a decade of unique service to blind college students, the Skinner Foundation has been dissolved.

Mr. and Mrs. Skinner had sought to contribute constructively to these students without duplicating existing aids and services and without consuming funds in administrative costs. So, with the help of NFB President and university professor Jacobus tenBroek, they formed a non-profit foundation on July 28, 1953.

The work of notifying blind student organizations and similar information points, and then weeding out the most urgent needs and recommending them to the Skinners, was undertaken by Professor tenBroek. The Skinners then devoted their time, energy and funds to fulfilling these needs, ranging from a braille writer or tape recorder to a Thermoform 55 -- a braille duplicating machine -- or clothing in which to student-teach, look for a job or attend a Phi Beta Kappa initiation. Sometimes the Skinner Foundation took care of a dental bill which put a student in the red; another time, it would grant the $50 difference between being able to pay that semester's tuition and having to quit school.

These students have since gone on to become social workers, public school teachers and lawyers. Others are successful engineers, Ph.D – holding college professors, and small business owners.

As the founder of the Four Wheel Brake Service -- a specialized car garage in San Francisco -- Skinner expanded his contributions as his company branched throughout the state. And when Mr. and Mrs. Skinner recently sold the Four Wheel Brake Service to retire, the Foundation was also dissolved.

For their years of deeply needed service, the MONITOR extends best wishes to the Skinners, who may retire knowing that they have contributed significantly to the enrichment of many individuals.

PARENTS OF MINORS HELD NOT WITHIN KIRCHNER RULE

In the 1965 case of Department of Mental Hygiene v. Kirschner, the California Supreme Court held unconstitutional a statute imposing financial liability on the relatives of the recipients of certain public assistance. The case held that public care of the mentally irresponsible is a public function, the cost of which must be borne by the state. This being so, the attempt to place such cost on the relatives of the civilly insane violates the constitutional equal protection guarantee because the relatives represent a classification lacking a "rational basis." This holding followed and extended a previous opinion which on the same constitutional ground had invalidated a provision imposing liability on a father for state maintenance of a criminally insane son.

The significance of the Kirchner decision lies in its concept of public benefit and of the purposes of state welfare programs. In going beyong the criminal case, in which the confinement is manifestly to protect the public, to the case of civil insanity, the court in Kirchner set out a principle of potentially sweeping application. Once it is established that care of the civilly insane is a proper public function and that there is no rational basis for taxing the confined person's relatives for this function, then extension to other public aid recipients is an easy step. It would logically follow that the public care or aid of minors, blind, sick, aged, and indigent are similarly functions of public benefit, the costs of which may not be imposed upon the recipients' relatives, since the latter do not constitute a class having a special relationship to the constitutional purpose of providing welfare to those in need. In this manner, the principles in Kirchner could spell the end of provisions in welfare programs imposing financial liability on the relatives of the recipients of public assistance.

However, in the three California cases which have reached the intermediate appellate level since the Kirchner decision, the District Court of Appeal has chosen to limit the Kirchner holding very narrowly rather than give it its full scope. In County of Alameda v. Kaiser, the right of a county to recover costs from a mother for treatment furnished a minor son in a county hospital was upheld. The court gave two grounds for not following Kirchner. First, it stated that there was present a rational basis for imposing liability on the parent. This basis it found in the traditional support obligation parents owe their minor children. This represents a tenable ground on which to distinguish Kirchner, for there two adults were involved. But the court went on to state that the hospitalization was mainly to benefit the patient son and the mother, and not the public at large, so there was properly speaking no general public function being performed. This assertion represents a failure to accept the basic principle of Kirchner, that aid to a specific individual does constitute a

general public benefit, and is thus a rejection rather than a proper application of Kirchner.

In a second case, In re Dudley, the appellate court upheld the imposition on a mother of the support costs of an institutionalized minor child. In distinguishing Kirchner, the court cited the voluntariness of the parent's appeal for public aid, an element not present in Kirchner. However, its main ground of distinction was that the parent had a pre-existing duty to support her child based on a separate section of the Civil Code, so that having the mother pay the state merely enforced rather than created an obligation. This ground does not seem relevant to determining the applicability of the Kirchner doctrine, for the doctrine depends upon the public nature of the assistance and on the basis of the class assessed.

In County of Alameda v. Espinoza, a case which the California Supreme Court has recently declined to review, the Court of Appeal upheld the imposition upon the father of the costs of institutionalizing a juvenile found guilty of certain crimes. Even though the youth's commitment was clearly involuntary, the court refused to follow Kirchner because of the nature of the juvenile proceedings to which the son was subject. As a broad ground, the court stated that relieving the parent of responsibility to pay would negate the policy in juvenile proceedings of keeping alive the ties of parental responsibility. More specifically and more basically, the court said that the purpose of the proceeding was to reform and rehabilitate the son, thus conferring a benefit upon him and his family. This the court distinguished from the confinement of adult criminals, which it said is for the benefit of the public generally. However, this distinction is inconsistent with both the letter and spirit of Kirchner, under which reformation of a juvenile is clearly as much a public benefit as the protection of society from criminals.

These three appellate court cases have thus tended to narrow the application of the Kirchner holding considerably. Most significantly, the lower court cases have not espoused Kirchner's broad and historic concept of what is a public function and of the public benefit implicit in all state aid to individuals. They have rather made formal distinctions between benefits conferred on society through its individual members and those conferred directly on society at large, finding a "public benefit" only in the latter. Further, and perhaps as an outgrowth of this narrow and untenable concept of public benefit, the lower courts have chosen to seek fairly technical grounds on which to find the principles enunciated in Kirchner inapplicable, such as whether the recipient was a minor or an adult, or whether the public aid was voluntarily applied for or was imposed by an agency or statute.

Since the state Supreme Court has given no reasons for declining to review the lower court applications of Kirchner, prediction as to the future development of the doctrine must be speculative. However, all three cases involved aid to minors, so that the Supreme Court's silence may perhaps be regarded as acquiescence in a limitation of Kirchner to adult aid recipients. It is likely that the Supreme Court will ensure the future application of the Kirchner doctrine to all adult aid programs and not just aid to insane persons, even if the appellate courts attempt so to limit the doctrine.

NEW APPOINTMENT TO REHABILITATION COUNCIL

Appointment of three new members to the National Advisory Council on Vocational Rehabilitation was announced by Miss Mary E. Switzer, Commissioner of Vocational Rehabilitation, U. S. Department of Health, Education and Welfare.

They are: Berthold Lowenfeld, Ph.D., of Berkeley, Calif., a consultant on education of the blind; Clinton L. Compere, M.D. of Evanston, Ill., an orthopedic surgeon; and Richard C. Coleman of Miami, Fla., employment manager of Eastern Airlines.

The new appointees replaced Arthur S. Abramson, M.D., professor in the Department of Physical Medicine and Rehabilitation, Albert Einstein College of Medicine, New York City; Vernon Luck, M.D., Director of the Los Angeles Orthopedic Hospital; and S. Richard Silverman, Ph.D., Director of the Central Institute for the Deaf, St. Louis, whose four-year terms have expired.

The 12-member National Advisory Council is a statutory group which advises the Vocational Rehabilitation Administration on its national program of grants for research and demonstrations on problems of rehabilitating disabled persons. The Council makes recommendations on grant applications to Miss Switzer, who serves as chairman.

CLINICS HELP SPOT EYE DISEASE

(From The Kansas City Star, Sept. 14, 1966)

One mother's concern over eye disease which strikes children has caused concern in others and inspired teams of volunteers to do something about it. Thus, three clinics have been formed to combat the disease, called amblyopia.

Last year Mrs. Rodney Kern read an article about amblyopia which has to do with focusing the eyes. When the muscles of one eye are weak, a child is not able to use it to overlap or fuse images into one picture with his other eye.

The inability to fuse images (amblyopia) can be corrected with glasses, exercise or minor surgery but time is a factor because vision development ends by six or seven years of age.

Mrs. Kern had had enough concern with her children regarding eye muscle development to write the National Assocation for the Prevention of Blindness in New York. Representatives sent her a kit to test children for amblyopia and she got approval from the Jackson County Board of Health to set up an eye clinic in Blue Springs last March.

Two sponsoring organizations sent volunteers to hold up pictures and eye charts as 100 children went through the test. Mrs. Kern called a friend to see if another clinic could be started in Independence. Mrs. Paul Foster accepted the challenge and got help from the Independence Jaycee Wives. Mrs. C. Stewart Gillmor, a past president of the Woman's City club, heard about the amblyopia prevention projects and talked to club members about it. The club agreed to sponsor a Kansas City clinic with financial assistance coming from the Carolyn Doughty Fund.

Mothers were urged to take their children, six years of age and under, to have their eyes tested. Volunteers held up eye charts and pictures of objects such as an umbrella, a house or a butterfly and asked the children to call out identifications from approximately 20 feet away. Batman masks were made to go over one eye while the other was tested.

Amblyopia strikes one in every 20 children in this country. Discovered at the end of World War II from eye tests conducted on 5,000 airmen, it is the leading cause of part blindness. "If symptoms are detected," Mrs. Kern said, "then the greatest need will be for parents to accept the child's condition and take him to an eye doctor as soon as possible."

WEST VIRGINIA CONVENTION

By Victor Gonzalez

The West Virginia Federation of the Blind met for its thirteenth annual convention August 20-21 at the Stonewall Jackson Hotel in Clarksburg.

Preceeding the convention was the quarterly meeting between representatives of the Federation and those of the Division of Vocational Rehabilitation which the state commissioner of the Department of Finance and Administration, Truman E. Gore, attended.

A reception for out-of-town guests was given the evening before the convention got underway. Highlighting the convention was the annual banquet with Leonard Robinson, supervisor, Division of the Visually Impaired, Division of Vocational Rehabilitation for the District of Columbia as the guest speaker. West Virginia's senior senator, Jennings Randolph, introduced Mr. Robinson. The Honorable Fred H. Caplan, presiding judge of the West Virginia Supreme Court of Appeals was the toastmaster. Thomas Furbee, a freshman at Fairmont State College, was awarded the C. C. Cerone Scholarship Award of $100 at the banquet.

Main actions passed by the convention were: to request Governor Smith to appoint an administrative assistant, as previously planned, whose duties shall be to conduct a survey of state government jobs that can be handled by handicapped people and then requesting the various department heads to hire the handicapped whenever a vacancy occurs; to request the director of the Division of Vocational Rehabilitation to establish an in-service training course for counselors so they may become more familiar with the abilities of the clients they serve; to request the state legislature to enact a bill that would set a minimum monthly grant-in-aid for blind welfare clients of $75 and additional amounts to be awarded dependdent upon need.

Action also taken: to direct the Federation secretary to telegram Senator Lister Hill of Alabama urging his committee's approval of H. R. 13712 which requests the state legislature to amend the present White Cane Law to conform with the model White Cane Law as drafted by the National Federation of the Blind; to express appreciation to the West Virginia Lions Clubs and to their Sight Conservation Foundation, for their work in behalf of the blind and for the successful operation of the Industrious Blind Enterprise which presently employs seventeen blind people paying the federal minimum wage.

Officers elected for the coming year are: Charles Monfradi of Wheeling, president; Guy Parks of Clarksburg, 1st vice president; Dr. John Adkins, Jr., of Huntington, 2nd vice president; Paul Hughes, of Wheeling, secretary; Evelyn Milhorn, of Wheeling, financial secretary; E. Sid Allen, of Huntington, treasurer; Roy Hoffman, of Charleston, chaplain. Charles Monfradi was elected delegate and Joe S. Smith of Morgantown alternate delegate to the 1967 annual convention of the National Federation of the Blind.

A POST - POLIO LOOKS AT LIFE

By Charles Lyser

(From The Spokesman, Western Disabled Alliance quarterly, Sept. 1966)

Part I The Raving Reporter

Mother told me there would be days like this (March 11, 1966) but I didn't believe her. Now I do. It all began December 23, 1965 when a polite Right of Way Agent for BART [Bay Area Rapid Transit] dropped in accompanied by my most friendly neighbor who had found out that my house was next in line for demolition, as it was impeding progress. I was told that the tentative date for taking my home was March 1, 1966, but it was very indefinite and "not to make any commitments". Now as my little home, in which I have lived for over 10 years, has become my whole business, social and every-other-kind of world, I was exceedingly concerned over having to move. As stated in another article it has taken me 10 years to evolve from a state of dependency requiring day-long assistance and/or ATD and Social Security Disability to my present status of working, earning and paying my own bills.

So now BART comes blithely along, marks my card "special consideration" and I am to be given a fair appraisal price for my home and given so many weeks to leave! No one in the whole BART enterprise has any idea of the careful planning, scheming, trial and error fumbling and problems in just going through one day's routine by a 75% disabled post-polio. I couldn't wait for BART to come along and tell me when to move, so I found another house in town and decided to buy it. FIRST MISTAKE - Real estate salesmen know less than nothing about houses. They know how to point out attractive points and overlook all unfavorable ones. Get a carpenter friend or contractor to look over your prospective home.

MISTAKE NUMBER TWO - if you ever attend classes at County Hospitals and you or your spouse signs a Reimbursement Agreement then don't forget about it because 12 years later you might wish to put some funds in escrow to buy another house. . . . .and you will find a big fat lien about which you knew nothing, holding up purchase of original or new acquisitions. Incidentally, in my case, the utmost in consideration and attention was given me and one week ago the house became mine (and the mortgagor's).

Fortunately for me I have a conscientious neighbor who is also very practical. After having a careful look at my new abode he said that he, his wife, son-in-law and daughter would take over. He thought I should have the backyard grass dug up and a concrete court or patio poured as well as a side ramp and one in front. I told him he was telling me exactly what I wanted, but didn't have the intestinal fortitude to go for it now.

Yesterday and today the work started. Although the house looked great with its fresh coat of paint, some amateur had put more enough on windows, furnace grate and door knobs. When the water was turned on every faucet leaked and a dead mouse and a bird's nest were found in a kitchen drawer. I'll need new door locks, new fixtures, and maybe a new roof. Maybe some new brains would help. However, there are some nice things about my new house. There is a 12 x 22 room with a separate entrance which I will use as an office. Two large bedrooms, ample kitchen and medium living room make up the rest of the mansion with a detached garage, painted but not too fancy.

Well, between paragraphs here my friend brought in a Knight of the Bathroom Fixtures who is going to raise the bath tub 10 inches so that my elaborate hydraulic hoist will not have to be transplanted. Haven't heard from BART yet, March 11, but when they finally arrive I'll say, "Brother, if you think building rapid transit is hard, just get wheelchaired and try finding another adequate home these inflationary times."

MISTAKE NUMBER THREE - Isn't two enough? Thank heavens for friends: that should cancel out my two goofs. If, and when I ever get moved I'll tell about it. So long. Your frenzied, frantic, raving reporter.

Part Two - The Valley

BART has reimbursed you fairly for your little house in which have passed the last 10 years, mostly alone. Your new-old house 8 blocks north has been ideally rejuvenated with a long, wide ramp, paving throughout except for juniper plantings, new wiring, fixtures fixed, floors

She drives and can put her wheelchair in and out and also do the same with yours and you! She runs the household; she writes unbelievable letters; she drives blind people to meetings; she would like to assist me in my work; she is indescribably fabulous.

Your new-old house has a year's lease; you worry about being able to do your share in the New Life but your clients are happy to let you continue services by mail. Ah well, you can't buck the City Hall that's upstairs.

'MEDICAID' TO EXPAND SERVICES

By Eugene Miller

(from the Oakland Tribune, Sept. 6, 1966)

Ever since it was passed by Congress, there has been a great deal of talk about Medicare and its benefits.

At the same time, a great many families are in the dark about Title 19 of the Medicare law, which paves the way for establishment of health and medical programs that may affect even more Americans than Medicare.

Title 19 provides federal support for states to help pay the health bills of the medically indigent regardless of age. In all, some 35 million people may be affected.

Unlike Medicare, which is aimed at providing health care for those over 65, the Title 19 provisions, now nicknamed "Medicaid" is open to those of all ages, including those over 65 in some cases.

Title 19 was added to the Medicare bill because its proponents felt that if a comprehensive health program were established for the aged, there should be equal treatment for other needy groups, such as the blind, the disabled, and children in low-income families.

Up until the passage of Title 19, health care for these groups was provided by a variety of programs, financed by the various state and local governments, with each unit setting its own requirements for eligibility and the extent of benefits.

Title 19 is supposed to do away with these differences and at the same time to upgrade the amount of health care.

The federal government under the program, picks up 50 to 83 per cent of the total medicaid costs of those states which agree to set up a unified medical assistance program.

To qualify, states have to amend their welfare laws to jive with guidelines set by the Department of Health, Education and Welfare.

So far, about 10 states' programs have been approved by the government and programs of quite a few other states are awaiting federal approval.

Each state sets its own eligibility requirements. In Illinois, a family of four can have a net income of $3,600 and qualify; in Oklahoma, the same size family must have an income of less than $2,448; in Pennsylvania the maximum is $4,000 and in New York it is a net income of $6,000.

Incidentally, to have a net income of $6,000 as defined in the law, you might have a gross income of between $7,000 and $7,500.

In many of the states, the Medicaid program covers a wide variety of costs including in-hospital treatment, out-of-hospital treatment, home nursing care, nursing-home care, and doctors' fees. In Minnesota it covers anything the doctor orders. In Illinois it covers dental care, eyeglasses, and physical rehabilitation services. In New York, in addition to basic care, it includes psychiatric care, drugs, eyeglasses, orthopedic appliances, and even necessary transportation for medical care.

In most state programs, once a family meets the requirement of being medically indigent (able to pay its normal bills, but not its medical bills) it can qualify for medicaid benefits without any coinsurance clauses and with only a small deductible at most.

Medicaid benefits are also available in some cases to those who are covered by Medicare, although the person has to exhaust his Medicare benefits before being entitled to Medicaid benefits.

In most states you apply for Medicaid benefits through the county welfare commissioner. To apply, you need to fill out forms that indicate your family size, relationship, employment, income, and so on. If you are a middle or low-income family, you should check into the Medicaid program to see if you are eligible.

The programs are different in each state and so are the income eligibility limits. Keep in mind, however, that not all states have passed Medicaid legislation or received federal approval for the legislation already passed. However, now is the time to start checking with your county officials to determine if your state has such a program, and if so, if your family qualifies.

DR. RUSK CALLS FOR MORE SPECIALISTS

Since rehabilitation services in the United States received impetus after World War II there has been a constant shortage of physicians trained in rehabilitation, according to Dr. Howard A. Rusk, director of the Institute of Physical Medicine and Rehabilitation in New York City.

In a N. Y. TIMES article published in connection with the 44th annual session of the American Congress of Physical Medicine and Rehabilitation held in San Francisco, Dr. Rusk wrote that although there are now approximately 500 physicians specializing in rehabilitation medicine, there are immediate openings for another 500.

Additional statistics provided by Dr. Rusk:

* By 1970 the nation could need 6,000 rehabilitation specialists.
* Of 400 approved residencies to provide training in rehabilitation nearly half are unfilled -- a number much higher than in the older, more established medical specialties.

He attributes these figures to the relative youthfulness of physical medicine and rehabilitation -- it became a recognized specialty less than 20 years ago. Also, Medicare and Medicaid have greatly increased medical manpower needs.

When the American Congress of Physical Medicine and Rehabilitation changed its name to the American Congress of Rehabilitation Medicine at the convention, Dr. Rusk pointed to it as a reflection of changes in program broadened to include the psychological, social and vocational management of the disabled persons' problems.

"Whereas rehabilitation was largely confined in the past to the medical management of patients with neuromuscular disabilities," states Dr. Rusk, "it has now been broadened in concept to include the total management of all the patient's problems and to include cardiovascular and

pulmonary problems as well."

The major problem, as seen by Dr. Rusk, is to train sufficient physicians, therapists and other personnel "to bring these improved treatment methods to the hundreds of thousands of disabled persons who are currently denied such services as a result of the lack of trained personnel."

MONITOR MINIATURES

The recently-created South Carolina Commission for the Blind -- product of years of effort by the S. C. Aurora Club with a notable assist from Kenneth Jernigan on behalf of the NFB -- set the latter part of October as target date for taking over services to more than 8,000 blind in the state. Dr. Samuel Lawton, founder of the S. C. Aurora Club of the Blind, has been selected as commission chairman. Its first director is Dr. Fred L. Crawford of New York.

From The N. Y. Times: A confidential statewide poll commissioned by the Texas State Bar disclosed that lawyers ranked second to last among the professions in Texans' esteem -- one point above chiropractors.

Dr. Isabelle Grant received the following letter from Malawi, Central Africa: "Thank you very much for the books you sent me. I received the paper, the slates and the styluses. They arrived here safely. For these I say Thank You. I am also receiving the Braille Monitor. Keep this good work going on. The message of the National Federation of the Blind is getting through. We go on from here!"

Rev. George McDermott, president of the Louisville (Ky.) Association of the Blind, and Mrs. McDermott are the proud parents of a baby daughter, Carol Sue, born August 16.

The Kentucky Governors Advisory Committee on employment for the blind has been appointed with a number of Federationists on it. There will be a meeting soon for organization.

From The BVA Bulletin (Blinded Veterans' Association): Blind business people will no longer have to depend on the honesty of their customers in order to identify bills of different denominations if the

claims of a Texas inventor are true. Instead, according to newspaper reports on new products on the market the blind person may use a "Surber Teller", an electronic device said to be capable of "reading" the denomination of bills.

Invented by Curtis M. Surber, president of Surber Electronic Research Corporation of Wichita Falls, Tex., the machine fits easily on a desk or counter and is simple to use, the newspaper accounts say. The procedure is described as follows: After the operator wraps the bill around a special plate, inserts the plate in the machine and twists a knob, he holds four fingers over four plunger buttons. If number one button pops up, the bill is $1; number two button means $2; number three, $5; and number four, $10. If all four buttons come up, it is a $20 bill.

THE RIGHT TO LIVE IN THE WORLD: THE DISABLED IN THE LAW OF TORTS
PART III

By Professor Jacobus tenBroek

[Editor's note: Given the right to appear in public, what are the conditions governing the presence of the blind and otherwise physically disabled? Does the right to travel public streets and roads ensure reasonably safe passage from the onslaught of automobiles, from unguarded trenches or building protrusions -- whether the blind use a white cane or guide dog or not? These questions are discussed in this month's installment: The Struggle for the Streets.

"The Right to Live in the World" was orignially prepared by Dr. tenBroek for the Law of the Poor symposium he organized last February. Surveying and analyzing the legal concepts governing freedom of movement by disabled persons, the article reinterprets conventional tort law doctrines in view of today's conditions of travel and traffic and argues for the integration of the physically disabled into normal community life.

The August portion discussed integrationism -- "a policy entitling the disabled to full participation in the life of the community and encouraging and enabling them to do so" -- as a national standard. The September segment dealt with the disabled's rights to free and equal access to public accommodations, conveyances, resorts and amusements- -emphasizing recent public access legislation and rapidly spreading movement to functionalize buildings for the disabled by removal of architectural barriers and the incorporation of necessary features. Guide dog legislation, now existing in 25 states, was reviewed and some of its inadequacies exposed.]

C. The Struggle for the Streets 863

"Public thoroughfares are for the beggar on his crutches as well as the millionaire in his limousine."[132] "The ordinary purpose of sidewalks and streets includes their use by the blind, the very young and the aged, the cripple and the infirm, and the pregnant woman. For such persons to use the streets is not contributory negligence."[133]

Once the disabled do appear in a public place where, as it is said, they have a right to be, what are the conditions of their presence? With what freedoms and liabilities do these phrases endow them? What are their responsibilities toward themselves, toward others, and of others toward them? Is the right to use the streets the same as the right of reasonably safe passage? If the disabled are liable for all acts or accidents proximately caused by their disability, if public bodies and able-bodied persons stand exactly in the same relationship to them as to

[132] Weinstein v. Wheeler, 127 Ore. 406, 413, 271 Pac. 753, 754 (1928), *rehearing denied*, 135 Ore. 518, 296 Pac. 1079 (1931).

[133] Garber v. City of Los Angeles, 220 Cal. App. 2d 349, 358, 33 Cal. Rptr. 157, 163 (1963), quoting David, *Municipality Liability in Tort in California*, 7 So. Cal. L. Rev. 472, 482 (1934).

able-bodied persons, if, in other words, disability is not to be taken into consideration for these purposes so as positively to protect the disabled against major hazards if not minor harms—then the right to be in public places is best described by Shakespeare:

> And be these juggling fiends no more believed
> That palter with us in a double sense;
> That keep the word of promise to our ear,
> And break it to our hope.[134]

This would indeed be requiring the blind man to see at his peril, something that Oliver Wendell Holmes told us a long time ago is not to be done.[135] In these circumstances, every trip to the mailbox or store, every stroll in the sun, every congregation with one's neighbors, every catching of a bus to go to school or work—all the ordinary and routine transactions of daily life safely conducted by the rest of the community in public places as a matter of course—would be conducted by the disabled at great hazard; such great hazard in fact as to encourage, if not to make necessary, their custodialization. To live in the world presupposes progress toward a goal of integration.

The judicial answers to the questions posed above have come in the form of special substantive rules on the disabled collected under the rubric of the law of negligence. The courts and textwriters prefer to say that the standards are not special or different but one and the same for everybody.[136] It is the circumstances to which the standards apply that are special and different, a mode of expression giving a sense of rhetorical integrity. However, the differences are important, whether they are said to be in the standards, as in the case of children,[137] or in the circumstances to which the standards apply, as in the case of the disabled.[138]

Negligence first appeared as an independent tort or civil wrong for which the courts would allow an action for damages in the 19th century at a time when the industrial revolution, and particularly the develop-

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[134] MACBETH, Act V, scene viii, lines 19-23.

[135] HOLMES, THE COMMON LAW 109 (1923 ed.).

[136] Fenneman v. Holden, 75 Md. 1, 22 Atl. 1049 (1891); Jakubiec v. Hasly, 337 Mich. 205, 59 N.W.2d 385 (1953); Davis v. Feinstein, 370 Pa. 449, 88 A.2d 695 (1952); Fletcher v. City of Aberdeen, 54 Wash. 2d 174, 338 P.2d 743 (1959). 2 HARPER & JAMES, TORTS § 16.7 (1956); PROSSER, TORTS § 32, at 155 (3d ed. 1964); RESTATEMENT (SECOND), TORTS § 283c (1964); 38 AM. JUR. NEGLIGENCE § 210 (1941).

[137] In 1841, in the case of Lynch v. Nurdin, L.R., 1 Q.B. 29 (1841), the Queens Bench laid down the basic doctrine in respect to the standard of care required of children—it was that of a reasonably prudent child of its years and development, not that of a reasonably prudent adult.

[138] FLEMING, TORTS 249 (3d ed. 1965); 2 HARPER & JAMES, *op. cit. supra* note 136, § 16.7, at 923-24; PROSSER, *op. cit. supra* note 136, § 32 at 154-57; RESTATEMENT (SECOND), TORTS § 283c (1964).

ment of the railroads, was beginning to produce a heavy crop of accidental injuries to the person.[139] The law of negligence is still true to its origins and is dominated today by the same sorts of factors, multiplied a thousandfold by the accident-producing capacity of modern industry and urban life, and above all, by conditions of automobile traffic. Not only are these very factors the causes of a great deal of disability—though disease is still the major cause—but they constitute and give rise to new and ever-increasing hazards of life for those already disabled from whatever cause.

Summarizing the generally accepted doctrine, the second Restatement of the Law of Torts defines negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."[140] The risk of harm is to be judged in the light of the likelihood that the harm will occur as well as its extent and severity. The risk, so judged, is then to be balanced against the character and importance of the conduct creating the risk and the feasibility and burden of providing protection against it.[141] The risk of harm is unreasonable if the first factors outweigh the second and the conduct which creates it is then said to be lacking in "due care." This is conduct in which the reasonable man of ordinary prudence does not engage. It is by this general formula, applied as the courts say to the special circumstances of the physically disabled, that the judges have sought to define the nature and scope of their right to live in the world. The judges pose as the critical question alike for those who create the risk and the disabled who run it: Would a reasonable man of ordinary prudence in like circumstances have done either?[142] It is only if the disabled plaintiff meets this standard of conduct and the defendant does not that the cost of injuries will be placed upon the latter. Otherwise, it will be allowed to lie where it falls.

If the disability is an element in the circumstances in which the disabled person finds himself, and if all elements in the circumstances are to be given their proper weight by the ordinarily prudent man in regulating his conduct, then a person's disability is to be taken into considera-

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[139] FLEMING, *op. cit. supra* note 138, at 107-08; 2 HARPER & JAMES, *op. cit. supra* note 136, § 12.3, at 751-52; PROSSER, *op. cit. supra* note 136, § 28, at 142-43.

[140] RESTATEMENT (SECOND), TORTS § 282 (1964). See also FLEMING, *op. cit. supra* note 138, at 110; 2 HARPER & JAMES, *op. cit. supra* note 136, at §§ 16.1, 16.2; PROSSER, *op. cit. supra* note 136, at §§ 30, 31.

[141] United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947); Chicago, B. & Q. R.R. v. Krayenbuhl, 65 Neb. 889, 91 N.W. 880 (1902); PROSSER, *op. cit supra* note 136, at 151-52; RESTATEMENT (SECOND), TORTS §§ 291-93 (1964).

[142] PROSSER, *op. cit supra* note 136, at 154; RESTATEMENT (SECOND), TORTS § 283 (1964).

tion in determining liability for injuries. In this proposition, English and American courts today unanimously agree.[143] Dean Prosser summarizes the conclusion by saying that the disabled person is entitled "to have allowance made by others for his disability"; and he in turn, must act reasonably "in the light of his knowledge of his infirmity . . . treated . . . merely as one of the circumstances under which he acts."[144] "Allowance made . . . for disability"; how, to what extent, in which circumstances, by whom? As to these issues, the courts are in strong disagreement. The disabled person, says Dean Prosser, "cannot be required to do the impossible by conforming to physical standards which he cannot meet."[145] Quite so! But if the right to live in the world consists only of exemption from this requirement, its proclamation may be a cruel hoax. To what requirements may they be subjected: to sally forth only in the care of an attendant? To use a dog as guide? To carry a cane, and if so, of any particular sort, and to be employed in any particular way? To travel only in familiar streets and places? Not to enter streets and places known to be defective or where work is being done? Not to enter streets and places possibly presenting particular traffic hazards? To proceed at his peril, because however carefully he may travel others need not anticipate his presence and take precautions accordingly?

The courts are divided as to the answers to each and every one of these questions; and the rhetoric is even more varied than the answers. The majority of courts say that it is not negligence per se for a blind man to walk the streets without a companion or attendant;[146] others that he may do so only in certain circumstances.[147] Some say that it is contributory negligence as a matter of law to travel without dog, cane, or

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[143] *E.g.*, Muse v. Page, 125 Conn. 249, 4 A.2d 329 (1939); Shields v. Consol. Gas Co., 193 App. Div. 86, 183 N.Y. Supp. 240 (Sup. Ct. 1920); Cook v. City of Winston-Salem, 241 N.C. 422, 85 S.E.2d 690 (1955); Weinstein v. Wheeler, 127 Ore. 406, 271 Pac. 733 (1928), *rehearing denied*, 135 Ore. 518, 296 Pac. 1079 (1931); Davis v. Feinstein, 370 Pa. 449, 88 A.2d 695 (1952); Smith v. Sneller, 345 Pa. 68, 26 A.2d 452 (1942); Fletcher v. City of Aberdeen, 54 Wash. 2d 174, 338 P.2d 743 (1959); Haley v. London Elec. Bd., [1965] A.C. 778 (1964).

[144] PROSSER, *op. cit. supra* note 136, § 32, at 155; FLEMING, *op. cit. supra* note 138, at 116-17, 162-63; 2 HARPER & JAMES, *op. cit. supra* note 136, § 16.7, at 920-21.

[145] PROSSER, *op. cit supra* note 136, § 32, at 155. See also RESTATEMENT (SECOND), TORTS § 283c (1964).

[146] *E.g.*, Town of Salem v. Goller, 76 Ind. 291, 292 (1881); Balcom v. City of Independence, 178 Iowa 685, 696, 160 N.W. 305, 310 (1916); Kaiser v. Hahn Bros., 126 Iowa, 561, 563, 102 N.W. 504, 505 (1905); Neff v. Town of Wellesley, 148 Mass. 487, 495, 20 N.E. 111, 113 (1889); Smith v. Wildes, 143 Mass. 556, 559, 10 N.E. 446, 448 (1887); Hestand v. Hamlin, 218 Mo. App. 122, 127, 262 S.W. 396, 397 (1924); Sleeper v. Sandown, 52 N.H. 244, 251 (1872); Davenport v. Ruckman, 37 N.Y. 568, 568-73 (1868); Fletcher v. City of Aberdeen, 54 Wash. 2d 174, 178, 338 P.2d 743, 745 (1959); Masterson v. Lennon, 115 Wash. 305, 308, 197 Pac. 38, 39 (1921).

[147] *E.g.*, Florida Cent. R.R. v. Williams, 37 Fla. 406, 20 So. 558 (1896).

companion;[148] others, that the failure to use one or more of these travel aids presents a question for the jury as to whether due care was employed.[149] No courts say that a blind man may not, when taking the proper precautions, enter unfamiliar territory; most courts, however, emphasize the plaintiff's knowledge of the surroundings and the frequency of his presence.[150] Some say that the plaintiff's knowledge that the streets are or may be defective or dangerous creates a kind of assumption of risk;[151] others, that in the circumstances, the disabled person may proceed but must do so with due care in the light of his knowledge.[152] The latter rule is also applied by some courts to blind persons in railway depots, at railway street crossings, and like places of similar danger,[153] while others say that it is gross negligence for blind persons to be in such places alone.[154] Some courts say that the disabled may proceed upon the assumption that the streets and highways are kept in a reasonably safe condition, and that cities and abutting property owners must expect the disabled to be abroad in the land and accordingly must take precautions necessary to warn or otherwise protect them.[155] Others say that those who create, maintain, or tamper with the streets and public passageways are only under a duty to safeguard the able-bodied pedestrian.[156]

No courts have held or even darkly hinted that a blind man may rise

[148] *Id.* at 419-20, 20 So. at 561-62.

[149] Smith v. Sneller, 345 Pa. 68, 72, 26 A.2d 452, 454 (1942); Fraser v. Freedman, 87 Pa. Super. 454, 457 (1926).

[150] *E.g.*, Balcom v. City of Independence, 178 Iowa 685, 696, 160 N.W. 305, 309 (1916); Chesapeake & Potomac Tel. Co. v. Lysher, 107 Md. 237, 240, 68 Atl. 619, 621 (1908); Neff v. Town of Wellesley, 148 Mass. 487, 489, 20 N.E. 111 (1889); Smith v. Wildes, 143 Mass. 556, 559, 10 N.E. 446, 448 (1887); Hestand v. Hamlin, 218 Mo. App. 122, 127, 262 S.W. 396, 397 (1924); Sleeper v. Sandown, 52 N.H. 244, 252 (1872); Davenport v. Ruckman, 37 N.Y. 568, 573 (1868).

[151] *E.g.*, Garbanati v. City of Durango, 30 Colo. 358, 360, 70 Pac. 686 (1902); Cook v. City of Winston-Salem, 241 N.C. 422, 430, 85 S.E.2d 696, 701-02 (1955).

[152] *E.g.*, Hestand v. Hamlin, 218 Mo. App. 122, 128, 262 S.W. 396, 398 (1924); Marks' Adm'r v. Petersburg R. Co., 88 Va. 1, 13 S.E. 299 (1891).

[153] See, *e.g.*, Farley v. Norfolk & W. Ry., 14 F.2d 93 (4th Cir. 1926); Rosenthal v. Chicago & A.R.R., 255 Ill. 552, 556, 99 N.E. 672, 672-73 (1912); Loitz v. New York Cent. & H.R.R., 7 App. Div. 515, 522, 40 N.Y. Supp. 253, 257 (1896).

[154] Florida Cent. R.R. v. Williams, 37 Fla. 406, 419, 20 So. 558, 562 (1896).

[155] *E.g.*, Balcom v. City of Independence, 178 Iowa 685, 693, 160 N.W. 305, 308 (1916); Rock v. American Constr. Co., 120 La. 831-33, 45 So. 741-42 (1908); Sleeper v. Sandown, 52 N.H. 244, 245 (1872); Shields v. Consol. Gas Co., 193 App. Div. 86, 90, 183 N.Y. Supp. 240, 242-43 (1920); Davenport v. Ruckman, 37 N.Y. 568-73 (1868); Fletcher v. City of Aberdeen, 54 Wash. 2d 174, 179, 338 P.2d 743, 746 (1959); Masterson v. Lennon, 115 Wash. 305, 308, 197 Pac. 38, 39 (1921); Short v. City of Spokane, 41 Wash. 257, 261-62, 83 Pac. 184, 185 (1906); Haley v. London Elec. Bd., [1965] A.C. 778, 790 (1964).

[156] Hestand v. Hamlin, 218 Mo. App. 122, 127, 262 S.W. 396, 397 (1924); Carter v. Village of Nunda, 55 App. Div. 501, 504, 66 N.Y. Supp. 1059, 1061 (1900); Cook v. City of Winston-Salem, 241 N.C. 422, 428, 85 S.E.2d 696, 700 (1955).

in the morning, help get the children off to school, bid his wife goodby, and proceed along the streets and bus lines to his daily work, without dog, cane, or guide, if such is his habit or preference, now and then brushing a tree or kicking a curb, but, notwithstanding, proceeding with firm step and sure air, knowing that he is part of the public for whom the streets are built and maintained in reasonable safety, by the help of his taxes, and that he shares with others this part of the world in which he, too, has a right to live. He would then be doing what any reasonable, or prudent, or reasonably prudent blind man would do, and also what social policy must positively foster and judges in their developing common law must be alert to sustain.

What were these blind plaintiffs doing in the streets and highways when they were injured? The answer is very instructive. They were doing what other people do who live in the world. In the two leading Washington cases,[157] they were going to and from work as piano tuners; in Massachusetts, a piano tuner had stopped at a store, made a purchase, and was going on down the street;[158] in Pennsylvania, a door-to-door salesman of small household items was in course of canvassing houses;[159] in New York, a door-to-door salesman was returning home from the meat market down the street;[160] in London, a telephone operator was following his daily routine of going to work;[161] in City of Independence, Iowa, a businessman was on his usual path to and from the business part of town;[162] in New Hampshire, a farm hand was passing along a familiar road, "a good man to hire . . . for . . . chopping wood, felling trees, mowing, reaping, threshing grain, digging potatoes, planting and hoeing, although with difficulty the first time hoeing corn";[163] in Town of Spirit Lake, Iowa, the plaintiff was taking the only available walk to church;[164] in North Carolina, the plaintiff was making a Sunday afternoon visit to a friend;[165] in Vermont, the plaintiff, riding along on a jaunt in a wagon with another fellow and two women, got out on the public highway in the dark of night to urinate.[166] Moreover, almost all of these plaintiffs had one

[157] Fletcher v. City of Aberdeen, 54 Wash. 2d 174, 338 P.2d 743 (1959); Masterson v Lennon, 115 Wash. 305, 197 Pac. 38 (1921).

[158] Smith v. Wildes, 143 Mass. 556, 10 N.E. 446 (1887).

[159] Smith v. Sneller, 345 Pa. 68, 26 A.2d 452 (1942).

[160] Shields v. Consol. Gas Co., 193 App. Div. 86, 183 N.Y. Supp. 240 (1920).

[161] Haley v. London Elec. Bd., [1965] A.C. 778 (1964).

[162] Balcom v. City of Independence, 178 Iowa 685, 160 N.W. 305 (1916).

[163] Sleeper v. Sandown, 52 N.H. 244, 245 (1872).

[164] Yeager v. Town of Spirit Lake, 115 Iowa 593, 88 N.W. 1095 (1902).

[165] Cook v. City of Winston-Salem, 241 N.C. 422, 85 S.E.2d 696 (1955).

[166] Glidden v. Town of Reading, 38 Vt. 52 (1865). In Missouri, the restaurant operator was walking to other parts of town for supplies as he usually did several times each day. Hestand v. Hamlin, 218 Mo. App. 122, 262 S.W. 396 (1924). In the Glenwood, Iowa case,

of the "common, well-known, compensatory devices for the blind . . . a cane, a seeing-eye dog, or a companion."[167]

The discussion in the cases has revolved around these principal topics: an analogy between the blind man in the daytime and the seeing man at night; the likelihood that the disabled will come by and be injured; contributory negligence of or the precautions taken or to be taken by the disabled person to prevent injury in the light of his disability; the practicability and cost to the city, contractor, or property owner of reducing the risk to reasonable proportions.

1. The Analogy

The early leading opinions dealing with the blind and the near-blind are preoccupied with an analogy built on sighted persons' conceptions of blindness: Blindness is shutting off the vision as by a blindfold or a perfectly dark night. This being so, and assuming the right of the blind to travel the streets at all, should not the law assimilate their daytime situation to that of the seeing man at night? In the early and much quoted New York case of *Davenport v. Ruckman*,[168] the court said:

> The streets and sidewalks are for the benefit of all conditions of people, and all have the right, in using them, to assume that they are in good condition, and to regulate their conduct upon that assumption. A person may walk or drive in the darkness of the night, relying upon the belief that the corporation has performed its duty and that the street or the walk is in safe condition. He walks by a faith justified by law . . . .[169]

This was the case of a person with some sight who, traveling along the walk in the daytime, had fallen into an unguarded cellarway. Four years later, the Supreme Court of New Hampshire dealt with the case of a totally blind person who, also traveling in the daytime, had fallen off a bridge fourteen to sixteen feet wide, the railing on one side of which was no longer present. It is immaterial, the plaintiff's attorney argued, "whether the accident happened for want of light or want of sight."[170]

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the plaintiff "helps his wife in laundry work for their neighbors, and has on occasion received aid from the county . . . ." The court thought it could "fairly assume that he felt the hurt of his bruises . . . none the less keenly than he would had his balance in [the] bank been larger." Hill v. City of Glenwood, 124 Iowa 479, 485, 100 N.W. 522, 524 (1904). In Maryland, the man who sewed brooms was leaving the sheltered workshop at the Maryland School for the Blind and returning to his living quarters. Chesapeake & Potomac Tel. Co. v. Lysher, 107 Md. 237, 68 Atl. 619 (1908). In New York, the store owner was returning home from business, crossing a creek in a scow. Harris v. Uebelhoer, 75 N.Y. 169 (1878).

[167] *E.g.*, Smith v. Sneller, 345 Pa. 68, 72, 26 A.2d 452, 454 (1942).

[168] 37 N.Y. 568 (1868).

[169] *Id.* at 573.

[170] Sleeper v. Sandown, 52 N.H. 244, 250 (1872).

Quite so, said the court: "Blindness of itself is not negligence. Nor [is] passing upon the highway with the sight of external things cut off by physical incapacity of vision . . . any more than passing upon the highway when the same things are wholly obscured by the darkness of night."[171] "[T]his plaintiff, although blind," the court added, "had the same right to assume the existence of a rail on each side that any traveller, passing either in the daytime or in the night-time would have. . . ."[172]

In the 1916 Iowa case, which has led the way for many states, the analogy of blindness to lack of light was given great weight in the case of a totally blind man who, again traveling in the daytime, fell into an unguarded seven-foot deep watermain ditch as he crossed the street.[173] The city was bound to make it safe for the sighted to pass at night when the sighted are blind. "[R]equiring a light for him who can see when there is a light proves that there is a duty to protect those who for any reason cannot see . . . ."[174]

While this analogy is basically weak in portraying as the same the travel problems of the blind and the sighted in the dark, it did prove a valuable starting point for the courts in seeing that the duty of the defendant is not confined to the able-bodied. Its logical, or perhaps more accurately, its psychological, role was thus historic in the process of imposing upon cities and abutting property owners an obligation to maintain the streets, highways, bridges and other public places in a condition safe for the disabled traveler—and this in an age when the courts were acutely concerned about keeping in hand judgments of plaintiff-minded juries in the interests of free enterprise and unencumbered industrial development.

While utilizing the analogy for this basic function, and moving, one feels, from humanitarian rather than policy considerations, the courts were not hindered by its difficulties or misled into many of its bypaths. If the daytime care the city owed the blind was the same as the night-time care it owed the sighted, then: providing a lamp should amply warn or illuminate; the use of compensatory travel aids would not be emphasized, unless perchance the sighted at night, in view of their unfortunate affliction, were to be required, on threat of contributory negligence, to use one of those well-known compensatory devices for men in want of light, such as a cane, a seeing-eye cat, or a blind attendant.[175]

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[171] *Id.* at 251.

[172] *Id.* at 252.

[173] Balcom v. City of Independence, 178 Iowa 685, 160 N.W. 305 (1916).

[174] *Id.* at 691, 160 N.W. at 308.

[175] Bussell v. City of Fort Dodge, 126 Iowa 308, 101 N.W. 1126 (1905).

At night the blind and the sighted would be put upon an identical footing.

The fact that lanterns placed about an excavation will not make the passage safe for a blind man, said the Iowa court is "adventitious." "Concede that there must be a light for those who have eyesight, when without the light the eyesight would be no protection, and it follows that there is a duty to guard those who cannot see, though a light be furnished, by guarding them with that which will be as much a protection to them as is the lamp to one whose inability to see is due to the darkness of the night."[176] So the differences do matter, too, and not just the similarities or supposed similarities.

The blind man must take his compensatory devices and cautions into the night, though the sighted are not expected to use them. Although the blind man in the road could not see, and, because the night was dark, could not be seen by the driver of a team bearing down on him, great emphasis was placed by the Vermont Supreme Court on his use of a cane in escaping from danger by safely finding the edge of the road and then falling into the ditch.[177] He had a right to assume, said the court, that the road was safe in its "surface, margin and muniments."[178] If plaintiff had been sighted, presumably he would have had the same right to a safe ditch but he would have been free to find it in whatever way a sighted man might in the light of all the circumstances. In another nighttime accident involving a blind man rowing across a creek, the New York court "assumed" that the creek was a public highway, "as much open to the use of a blind man as one having eyesight."[179] Whether sighted in the night or blind, a person "must be more cautious. He must bring about him greater guards, and go more slowly and tentatively than if he had his eyesight, or the light of day shone upon him."[180] Notwithstanding these firm declarations, the court in this case made much of the fact that the blind man had his sighted wife in the boat with him and that the night was clear. Neither enabled him to avoid a collision with a tug boat though both together had a lot to do with his avoiding the defense of contributory negligence.

Some courts have never accepted the basic conclusion about the extent of the defendant's duty, with or without the use of the analogy. In the 1955 case of *Cook v. City of Winston-Salem*,[181] the North Carolina Supreme Court held that the city and its contractors were under no duty

[176] Balcom v. City of Independence, 178 Iowa 685, 691, 160 N.W. 305, 308 (1916).
[177] Glidden v. Town of Reading, 38 Vt. 52, 53, 57 (1865).
[178] *Id.* at 57.
[179] Harris v. Uebelhoer, 75 N.Y. 169, 175 (1878).
[180] *Ibid.*
[181] 241 N.C. 422, 85 S.E.2d 696 (1955).

to place a signal or guard at a dropoff from the path to the street resulting from an incompleted repaving operation *"during the daytime, when it was plainly visible."*[182]

2. Likelihood of Harm

Whether the risk of harm created by the conduct of the defendant is unreasonable depends in part on the likelihood that it will occur. If the likelihood is very slight, even though the potential harm be quite serious, the defendant is not charged with responsibility for safeguarding persons against it. This manner of stating the duty of the defendant, increasingly popular today, is not uniformly employed in the cases. Since there is a judicial tendency to describe the accident in terms of the actions of the plaintiff and to focus particularly on questions of contributory negligence, the courts often speak of the right of the plaintiff to proceed upon the assumption that the streets and highways will be maintained in a reasonably safe condition, leaving the duty of the defendant to maintain them implicit or expressed in a subordinate way.[183]

Another mode of stating the duty of the defendant is as the Iowa court did: The due care obligations of the plaintiff and the defendant are correlative. The blind man must use more precautions because he is blind; the city must act in the light of his right to be in the streets and in recognition of his disability.[184] The Iowa court also suggested a stricter standard: The wrongdoer need not anticipate the consequences of his actions; that they did in fact occur is sufficient. In this view, it would not matter that "no blind man had ever before used a walk in the town."[185] In any event, the particular plaintiff had used these very streets for ten years so the city could not claim ignorance of his presence. In 1905, the Washington Supreme Court approved this instruction: "The

[182] *Id.* at 428, 85 S.E.2d at 700.

[183] *E.g.*, Town of Salem v. Goller, 76 Ind. 291, 292 (1881); Smith v. Wildes, 143 Mass. 556, 559, 10 N.E. 446, 448 (1887); Sleeper v. Sandown, 52 N.H. 244, 251-53 (1872); Shields v. Consol. Gas Co., 193 App. Div. 86, 90, 183 N.Y. Supp. 240, 242-43 (1920); Harris v. Uebelhoer, 75 N.Y. 169, 174-77 (1878); Davenport v. Ruckman, 37 N.Y. 568, 573 (1868); Glidden v. Reading, 38 Vt. 52, 57 (1865).

The right of reliance on a safe street or highway antedates the cases announcing the right of the disabled to be upon the streets and highways. See, *e.g.*, Thompson v. Bridgewater, 24 Mass. (7 Pick.) 187 (1829). The first American cases dealing with the right of the blind were handed down in the 1860's. Winn v. City of Lowell, 83 Mass. 177, 189 (1861); Davenport v. Ruckman, 37 N.Y. 568, 573 (1868); Glidden v. Reading, 38 Vt. 52 (1865). An English court in Boss v. Litton, [1832] 5 C. & P. 407, 409, 24 E.C.L. 628, 630 (1831), first declared that "all persons, paralytic as well as others, had a right to walk in the road, and were entitled to the exercise of reasonable care on the part of persons driving carriages along it."

[184] Balcom v. City of Independence, 178 Iowa 685, 691-92, 160 N.W. 305, 308 (1916).

[185] *Id.* at 690, 160 N.W. at 309.

city is chargeable with knowledge that all classes of persons, including the healthy and diseased and lame, constantly travel its streets and sidewalks."[186] This doctrine was specifically applied to the blind in a later case.[187] Foreseeability is a term used by some courts to cover the presumption that the defendant is on notice that disabled persons are likely to happen along.[188]

The statement by an English author that "a century ago there was no rule either recognizing or refusing to recognize a duty of care toward blind pedestrians because they were rarely seen in the streets"[189] is inaccurate as to the facts in England and America and as to the law in America.[190] One century ago, two centuries ago, five centuries ago, the blind were notorious frequenters of the streets of the towns, carrying out their historic role, and often their privileged status, as beggars.[191] What was rare was a blind man moving about the streets for some other purpose, and especially for the regular activity of going to work as the plaintiff in *Haley v. London Elec. Bd.* was doing.[192] Indeed, the number of cases getting to appellate courts by and about the turn of the century involving blind or nearly blind plaintiffs is in many ways surprising. While some blind individuals were active and mobile, this course of conduct was not encouraged by governmental policy, by community attitudes, by the mores of the times, or by the public or private programs established for the benefit of the blind. Blind children attended segregated residential schools, if any, where classes and the activities of daily

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[186] Short v. City of Spokane, 41 Wash. 257, 262, 83 Pac. 183, 185 (1905).

[187] Fletcher v. City of Aberdeen, 54 Wash. 2d 174, 338 P.2d 743 (1959). In Missouri it was held for a time that the city's duty to keep its sidewalks in repair only required it "to use ordinary care to maintain its streets in a reasonably safe condition for general traffic in all the usual and ordinary modes of travel." Bethel v. St. Joseph, 184 Mo. App. 388, 394, 171 S.W. 42, 44 (1914). See also Wilkerson v. City of Sedalia, 205 S.W. 877 (Mo. 1918). The Missouri Supreme Court overruled these cases in favor of the proposition that the duty of the city extended to providing reasonably safe streets for all classes of pedestrians including the disabled. Hunt v. St. Louis, 278 Mo. 213, 211 S.W. 673 (1919). See also Bianchetti v. Luce, 222 Mo. App. 282, 290, 2 S.W.2d 129, 133 (1928); Hanke v. St. Louis, 272 S.W. 933 (Mo. 1925).

[188] Kennedy v. Cohn, 73 Pa. D. & C. 544, 548 (C.P. 1950); Clawson v. Walgreen Drug Co., 108 Utah 577, 583, 162 P.2d 759, 762 (1945); Haley v. London Elec. Bd., [1965] A.C. 778, 791 (1964).

[189] Dias, *A Hole in the Road*, 73 THE LISTENER 292, 294 (1965).

[190] See *e.g.*, Winn v. City of Lowell, 83 Mass. (1 Allen) 177 (1861); Sleeper v. Sandown, 52 N.H. 244 (1872); Davenport v. Ruckman, 37 N.Y. 568 (1868).

[191] tenBroek, *California's Welfare Law—Origins and Development*, 45 CALIF. L. REV. 241, 252 (1957); NUEVA RECOPILACIÓN, bk. 1, tit. XII, law 15 (1567). See, *e.g.*, NOVISIMA RECOPILACION, bk. VII tit. XXXIX, law 8 (1805).

[192] [1965] A.C. 778 (1964). See text accompanying notes 200-09 *infra*, for a discussion of this case.

life were all conducted within the confines of the institution.[193] In adult life, many of the blind were cared for and custodialized by their families or worked in sheltered shops attached to institutional living arrangements, often the residential school.[194] (Homes provided for the blind and almshouses cared for the aged.[195]) Yet even at this time, as we have just shown, some blind persons were abroad in the land and some courts were proclaiming their right to be there and imposing on public bodies the duty to protect them in the safe exercise of it.

Today the picture is quite different. Blind children and youths are attending public schools and colleges, making their way to and from them alone. Blind and otherwise disabled adults are encouraged in many ways to live active lives whether or not they are able to secure gainful employment: by financial aid programs which make this possible;[196] by case work services in the welfare system;[197] by home teacher programs throughout the country designed,[198] among other things, to teach blind persons to travel alone; by orientation and rehabilitation programs which regard mobility as a must.[199] The total number of blind people in a

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[193] See generally FARRELL, THE STORY OF BLINDNESS (1956); FRAMPTON & KEARNEY, THE RESIDENTIAL SCHOOL (1953); FRENCH, FROM HOMER TO HELEN KELLER (1932); RICHARDS, SAMUEL GRIDLEY HOWE (1935); RICHARDS, LETTERS AND JOURNALS OF SAMUEL GRIDLEY HOWE (1909).

[194] See generally Chouinard, *Sheltered Workshops—Past and Present*, paper read at the Fifth Atlantic City Rehabilitation Conference, 1957; Chouinard & Garrett, *Workshops for the Disabled: A Vocational Rehabilitation Resource*, U.S. Dep't of Health, Educ. & Welfare, Office of Vocational Rehabilitation (Rehabilitation Services Ser. No. 371); FRENCH, *op. cit. supra* note 193. In Chesapeake & Pacific Tel. Co. v. Lysher, 107 Md 237, 68 Atl. 619 (1908), the blind plaintiff when injured was leaving a sheltered shop located at the Maryland School for the Blind where he had worked for four years after graduating from the school. Samuel Gridley Howe, famed pioneer in education of the blind and other educational projects, started the first sheltered shop in the country in connection with the New England Asylum for the blind in 1840. The men who worked in it lived at the asylum until 1880. FARRELL, *op. cit. supra* note 193, at 68, 159-60.

[195] tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 900, 931 (1964).

[196] 49 Stat. 645 (1935), as amended, 42 U.S.C. §§ 1201-06 (1964). See also CAL. WELFARE & INST'NS CODE §§ 13000-102 (California's Program for Aid to Potentially Self-Supporting Blind).

[197] 76 Stat. 186 (1962), 42 U.S.C. §§ 1201, 1351 (1964).

[198] See, *e.g.*, CAL. EDUC. CODE § 6209.

[199] Over twenty public and private educational institutions throughout the country give mobility training. This does not include dog-guide centers, of which there are perhaps a dozen, or training offered by all residential schools or most resource classes in public schools. At least two groups are operating in California under grants from the Federal Department of Health, Education, and Welfare related to public schools—one in Alameda-Contra Costa County and one in Los Angeles County. There are many like projects country-wide. In two universities, West Michigan University located at Kalamazoo Michigan, and Boston College in Boston, Massachusetts, mobility teacher training courses are offered. See also Rives, *The Blind and Today's Jobs*, Rehabilitation Record, March-April, 1965, p. 6.

community has increased with the general growth in population. But a far greater precentage of them than ever before is out in the community.

In the recent *Haley* case[200] decided by the Judicial Committee of the House of Lords, the foreseeability doctrine was thoroughly explored. Reliance was placed on common knowledge, government statistics, and the judicially noticeable fact that "we all are accustomed to meeting blind people walking alone with their white sticks on city pavements."[201] In the London area at the time there were 7,321 registered blind people, and in Great Britain as a whole, 107,000, or about 1 in every 500.[202] In the United States the figures are comparable.[203] Moreover, the growing use of the white cane has increased the visibility and conspicuousness of the blind part of the population. One would suppose that no court in the land would any longer hear a city, from the greatest metropolis to the least village, maintain that it could not be expected to anticipate that numbers of disabled persons, including blind, would pass that way, unattended, and in the free exercise of their right to be in the streets and highways. That the duty of providing suitable warning or protection might still not be imposed, as in North Carolina,[204] can rest only on a policy determination, and not on the defendant's claimed lack of knowledge. That policy determination is one contradicting the policy judgment of much of the rest of society.

The House of Lords in *Haley*[205] carefully avoided all policy questions and commitments. It merely insisted that the courts recognize the existing fact, a partial and grudging adaptation of the law to contemporary needs.[206] "No doubt there are many places open to the public," said Lord Reid, "where for one reason or another one would be surprised to see a blind person walking alone but a city pavement is not one of them. And a residential street cannot be different from any other. The blind people we meet must live somewhere and most of them probably left their homes unaccompanied."[207] Cities must be charged with this common knowledge and placed under a duty of warning or other protection. "If it be said that your Lordships are making new law," wrote Lord Evershed, "that is only because, whatever may have been the facts and circumstances reasonably to be contemplated a hundred years or more

[200] Haley v. London Elec. Bd., [1965] A.C. 778 (1964).

[201] *Id.* at 791.

[202] *Id.* at 807.

[203] Estimated at between 350,000 to 400,000. Hurlin, *Estimated Prevalence of Blindness In the United States and in Individual States*, 32 SIGHT SAVING REV. 4 (1962).

[204] Cook v. City of Winston-Salem, 241 N.C. 422, 85 S.E.2d 696 (1955).

[205] Haley v. London Elec. Bd., [1965] A.C. 778 (1964).

[206] *Ibid.*; see FLEMING, TORTS 162-63 (3d ed. 1965).

[207] [1965] A.C. at 778, 791

ago, at the present time it must be accepted as one of the facts of life that appreciable numbers of blind persons, having had the requisite training, are capable of using or use in fact public footpaths such as that in Charleton Church Lane and that accordingly their presence upon such footpaths cannot reasonably be disregarded or left out of account by those undertaking work of the character being in the present case done by the respondent board."[208] In overruling the 1950 leading case,[209] the Lords said they were merely distinguishing it and thereby allowed some dangerous doctrine to remain unrepudiated. The law, lagging far behind social developments, was merely catching up with what blind people were actually doing. The Lords were not implementing the public policy of integration, a policy which in large part accounted for so many blind people being in the streets and which made this decision necessary.

3. Contributory Negligence

Doctrines of contributory negligence are variously described as harsh, illogical, and disappearing.[210] Such doctrines have been particularly rife in the disabled cases. Here misconceptions as to the nature of disability have added to the general confusion and there is little evidence that these doctrines are disappearing. Some rhetorical regularity is being achieved as the courts gradually are eliminating talk of a higher standard of care imposed on the disabled person by reason of his disability,[211] and are speaking instead of a universal duty of ordinary care requiring the disabled person, by reason of his disability, to use greater efforts to avoid hazards, to take greater precautions, to be more keenly watchful by the fuller use of remaining senses, or otherwise to seek to compensate for his disability.[212] This rhetorical regularity, however, accomplishes no sub-

[208] *Id.* at 800-01.

[209] Pritchard v. Post Office, 114 J.P. 370 (C.A. 1950).

[210] FLEMING, *op. cit. supra* note 206, at 224-25; 2 HARPER & JAMES, TORTS § 22.3 (1956); PROSSER, TORTS § 64 (3d ed. 1964).

[211] See, *e.g.*, Winn v. City of Lowell, 83 Mass. (1 Allen) 177, 180 (1861); Karl v. Juniata County, 206 Pa. 633, 637-38, 56 Atl. 78, 79 (1903).

[212] Garber v. City of Los Angeles, 226 Cal. App. 2d 349, 358, 38 Cal. Rptr. 157, 163 (1964); Muse v. Page, 125 Conn. 219, 223, 4 A.2d 329, 331 (1939); Balcom v. Independence, 178 Iowa 685, 692, 160 N.W. 305, 308 (1916); Kaiser v. Hahn Bros., 126 Iowa 561, 564, 102 N.W. 504, 506 (1905); Hill v. City of Glenwood, 124 Iowa 479, 481-82, 100 N.W. 522, 523 (1904); Gill v. Sable Hide & Fur Co., 223 Ky. 679, 680, 4 S.W.2d 676, 677 (1928); Chesapeake & Potomac Tel. Co. v. Lysher, 107 Md. 237, 241, 68 Atl. 619, 622 (1908); Keith v. Worcester Street Ry., 196 Mass. 478, 482-83, 82 N.E. 680-81 (1907); Neff v. Town of Wellesley, 148 Mass. 487, 495, 20 N.E. 111, 113 (1889); Sleeper v. Sandown, 52 N.H. 244, 251 (1872); Shields v. Consol. Gas Co., 193 App. Div. 86, 90, 184 N.Y. Supp. 240, 242 (1920); Carter v. Village of Nunda, 55 App. Div. 501, 504, 66 N.Y. Supp. 1059, 1061 (1900); Kennedy v. Cohn, 73 Pa. D. & C. 544, 552 (C.P. 1950); Clawson v. Walgreen Drug Co., 108 Utah 577, 584, 162 P.2d 759, 763 (1945); Masterson v. Lennon, 115 Wash. 305, 308, 197 Pac. 38, 39 (1921).

stantive change. Still to be decided in each case, in the light of the particular disability and other circumstances, is the question whether the individual plaintiff produced the requisite effort, precautions, watchfulness, or compensation. Whether described as a higher standard of care or as a standard of ordinary care applied to more difficult circumstances makes little difference in the end. The preponderant rule is that this question of requisite care is to be left to the jury or trier of fact. Two fairly recent cases, however, stand as leading authority for a different proposition.

In *Smith v. Sneller*[213] the Pennsylvania Supreme Court held a blind plaintiff guilty of contributory negligence as a matter of law who proceeded along the sidewalk without using one of the "common, well-known, compensatory devices for the blind, such as a cane, a 'seeing-eye' dog, or a companion."[214] In a follow-up case, the same court later held that once the blind person had the compensatory device it was then a question for the jury whether he was guilty of contributory negligence in its use.[215] In *Cook v. City of Winston-Salem*[216] the Supreme Court of North Carolina outdistanced even the Supreme Court of Pennsylvania, in an opinion that can only be regarded as more than 100 years behind the times, even though it adhered to the rhetorical regularities before mentioned. The blind plaintiff was declared guilty of contributory negligence in that he "failed to put forth a greater degree of effort than one not acting under any disabilities to attain due care for his own safety: that standard of care which the law has established for everybody" even though he was guided by a well-trained seeing-eye dog handled in the approved way and performing its function as trained.[217]

These cases raise the question as to the nature, adequacy, and proper use of the "common, well-known, compensatory devices for the blind" and their relationship to the law of contributory negligence. In the first place, one takes it for granted that the list of devices provided in the *Smith* case is illustrative and not necessarily exhaustive. Presumably, any or all of them could be discarded as outmoded if new and better devices were developed. Experimental efforts to this purpose have long been going on in the physics departments at the Massachusetts Institute of Technology and Haverford College, many blind-concerned agencies, and by numerous private individuals and companies. A central clearing and testing agency has been established at Massachusetts.

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[213] 345 Pa. 68, 26 A.2d 452 (1942)
[214] *Id.* at 72, 26 A.2d at 454.
[215] Davis v. Feinstein, 370 Pa. 449, 452, 88 A.2d 695, 697 (1952)
[216] 241 N.C. 422, 85 S.E.2d 696 (1955)
[217] *Id.* at 431, 85 S.E.2d at 702.

Secondly, and more importantly, the situations presented in the cases we have been discussing, if no others, illustrate the limitations of the devices and the people who use them. The farm hand in New Hampshire fell off the unrailed side of a bridge though he "felt his way with his cane very carefully . . . ."[218] The piano tuner in Washington, using his cane in his habitual and customary way while traveling along the walk, "hit the pile of lumber with his cane at the narrow place in the sidewalk, stepped aside to avoid the lumber, and fell into the excavation . . ." on the other side of the walk.[219] The door-to-door salesman in New York carried a cane but, anticipating no danger, was not using it when he stepped off the curb and fell into the trench, which he could well have done even if he had first found the curb with his cane.[220] "[W]hen he approached the place where the rail was down," on the wooden walk elevated four feet over the street, the partially blind person in Colorado "commenced walking slowly, and felt about him with his cane very carefully, for the purpose of definitely locating the walk, but, notwithstanding these precautions, fell off."[221] Haley was using his cane which either went over or under the handle of the punner hammer placed athwart his path, the punner hammer then tripping him and proving a trap rather than a guard.[222] The door-to-door salesman in *Smith v. Sneller*[223] was not carrying a cane. He stepped on a two-foot-high pile of dirt bordering an unguarded trench across the sidewalk. The dirt gave way and he fell into the trench. This could easily have happened to a man with a cane despite the court's confident assertion that any one of the compensatory devices "probably would have been sufficient to prevent this accident."[224] Just how easily is illustrated by the follow-up Pennsylvania case where the blind plaintiff fell into an open cellarway though he "carried a white cane customarily employed by blind persons."[225] He was using his cane as a guide "moving it laterally in order to touch the walls of abutting buildings and keep on a straight course, and also tapping the ground before him . . . ."[226] The carouser by night in Vermont, in seeking the side of the highway, "put his cane before him with the point resting upon the ground, and in that manner felt his way

[218] Sleeper v. Sandown, 52 N.H. 244 (1872).

[219] Masterson v. Lennon, 115 Wash. 305, 307, 197 Pac. 38, (1921).

[220] Shields v. Consol. Gas Co., 193 App. Div. 86, 89, 183 N.Y. Supp. 240, 242 (1920).

[221] Garbanati v. City of Durango, 30 Colo. 358, 359, 70 Pac. 686 (1902).

[222] Haley v. London Elec. Bd., [1965] A.C. 778, 790 (1964).

[223] 345 Pa. 68, 71, 26 A.2d 452, 453 (1942).

[224] *Id.* at 72, 26 A.2d at 454.

[225] Davis v. Feinstein, 370 Pa. 449, 451, 88 A.2d 695, 696 (1952). See also Kennedy v. Cohn, 73 Pa. D. & C. 544, 546 (C.P. 1950).

[226] Davis v. Feinstein, *supra* note 225, at 452, 88 A.2d at 696.

before him, moving his cane about as he walked to find obstructions if there were any"; he felt the edge with his cane and then either stepped over or fell over into the ravine below.[227] The guide dog in North Carolina came to the edge of the drop-off and stopped as all good guide dogs should do. His master came down on the foot that was in the air and tumbled down the embankment.[228] The churchgoer in Spirit Lake, Iowa, was not saved from her accident by the fact that she was accompanied by her husband,[229] or the creek-crosser in New York by his wife.[230] All blind people are acquainted with the risk of traveling with an unfamiliar sighted companion who is so preoccupied with the problem of guiding him as to be inalert to ordinary hazards or unsure how to avoid them when observed.[231]

Among ordinary cane users and the so-called experts alike, there is a lively debate about the merits of various canes—should they be long or short, rigid or folding, metal, fiber glass, or wood, with curved or straight handles. Similar debate exists between the cane users and the dog users.[232] A blind person carrying two canes, one in each hand, tapping the ground before him with one, following the buildings and curb alongside with the other, still exposes his head as a ready target for every leaning ladder, protruding piece of scaffolding, or low-slung awning bar. An agile and adept blind person without any device may in any given case travel better than most blind persons with one. In this state of uncertainty, divided opinion and diverse experience, courts are unwise indeed to make any particular procedure so important as to declare contributory negligence per se the conduct of a blind person who does not use it.

In nineteen states,[233] questions of contributory negligence of the physi-

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[227] Glidden v. Reading, 38 Vt. 52, 53 (1865).

[228] Cook v. City of Winston-Salem, 241 N.C. 422, 426, 85 S.E.2d 696, 699 (1955).

[229] Yeager v. Town of Spirit Lake, 115 Iowa 593, 597, 88 N.W. 1095, 1096 (1902).

[230] Harris v. Uebelhoer, 75 N.Y. 169, 170 (1878).

[231] In City of Rock Island v. Gingles, 217 Ill. 185, 75 N.E. 468 (1905), the only blind participant was a horse, who, at dusk, walked into a deep, unguarded trench in the street, drawing his sighted driver in after him. Though the horse had and was using one of those common, well-known, compensatory devices for blind horses, namely a sighted driver, he walked by a faith not justified by law.

[232] *A White Cane Debate: Liechty vs. Taylor*, The Braille Monitor, Mar. 1965, p. 16; *Guide Dog or White Cane: Which One*, The Braille Monitor, Mar. 1965, p. 29; *On Dogs: Ask the Man Who Owns One*, The Braille Monitor, May 1965, p. 4; *A Further Argument on the White Cane*, The Braille Monitor, July 1965, p. 14.

[233] ALASKA COMP. LAWS ANN. §§ 28.25.010-.040 (Supp. 1963); FLA. STAT. § 413.07 (1959), ILL. REV. STAT. ch. 95½, § 172a (1959); KAN. GEN. STAT. ANN. § 8-558 (1949); KY. REV. STAT. § 189.575 (Supp. 1962); LA. REV. STAT. § 32:217 (Supp. 1962), ME. REV. STAT. ANN. ch. 22, §§ 132-35 (Supp. 1963), MISS. CODE ANN. § 8263.5 (1956); MO. ANN. STAT. §§ 304.080-.110 (Supp. 1959); N.C. GEN. STAT. §§ 20-175 (1958); N.D. REV. CODE § 39-10-31

cally disabled in street and automobile accidents have now been settled by the so-called white cane laws, to be discussed in detail later.[234] In substance, those laws confer on the blind, and sometimes on otherwise disabled persons, positive rights in travel if they are carrying the white cane or are led by a guide dog. These laws in the nineteen states, preserve the pre-existing rights on streets and sidewalks and in traffic of blind persons without canes or dogs. The failure to have a cane or dog, it is declared, shall not be held to be contributory negligence or evidence thereof. In general, thus, in these nineteen states, blind persons without cane or dog may travel the streets and sidewalks without being flatly precluded from recovering for accidents, or, even without having their failure to use the travel aids considered at all as a factor in determining whether they were in the exercise of due care. This provision was incorporated in the white cane law of Pennsylvania,[235] enacted after the decisions in the *Fraser*[236] and *Smith*[237] cases and the rule in those cases making it negligence per se to travel without aids has therefore now been reversed by the legislature. To do just that was the intention of the drafters and sponsors of the white cane law in Pennsylvania. The provision is also incorporated in the white cane law of North Carolina[238] enacted prior to the decision of the North Carolina Supreme Court in *Cook v. City of Winston-Salem*.[239] Nevertheless, the provision and the statute were neither discussed nor applied by the court in rendering that decision. Since the blind pedestrian in that case was guided by a dog, the provision was not literally dispositive. Yet the provision and the other clauses of the white cane law can only be read to settle the case. They are designed to free the blind without travel aids of contributory negligence in ordinary street and sidewalk accidents and to free the blind with travel aids of contributory negligence in automobile accident cases. This design is frustrated and these laws are rendered meaningless by a decision which holds that the blind with travel aids (and presumably without them as well) are guilty of contributory negligence as a matter of law in ordinary street and sidewalk accident cases if they fail to see what

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(Supp. 1957); PA. STAT. ANN. tit. 75, § 1039 (1960); R.I. GEN. LAWS ANN. §§ 31-18-13 to 31-18-16 (1956); S.C. CODE §§ 438-41 (Supp. 1962); S.D. CODE §§ 44.0318-1, 44.9932 (Supp. 1960); TEX. REV. CIV. STAT. ANN. art. 671e (1960); VT. STAT. ANN. tit. 23, § 1106 (1959); VA. CODE ANN §§ 46.1-237 to 46.1-240 (1950); W. VA. CODE ANN. § 1721(373)(7) (Supp. 1961).

[234] See text accompanying notes 360-411 *infra*.

[235] PA. STAT. ANN tit. 75, § 1039 (1960).

[236] Fraser v. Freedman, 87 Pa Super. 454 (1926).

[237] Smith v Sneller, 345 Pa. 68, 26 A.2d 452 (1942).

[238] N.C. Sess. Laws 1949, ch 324, §§ 1-4.

[239] 241 N.C. 422, 85 S.E.2d 696 (1955).

is plainly visible to the seeing. In North Carolina, the white cane law is thus ignored by the supreme court and the blind are required to see.

4. Making the Risk Reasonable

The text-writers more than the courts talk about balancing the risk—that is, the likelihood of the harm occurring and its seriousness when it does—against the importance to the community of the defendant's activity and the feasibility and cost of taking preventive or protective action. Some of the cases, however, do talk in these terms in the field of our concern; and, in most no doubt, it is implicit. Just as, on the one hand, the judges do not consciously consider the importance and policy of the disabled being abroad, so, on the other, they automatically assume the importance and inevitability of trenches for sewers, water and gas pipes down streets and across sidewalks, cellarways and loading pits, street and sidewalk holes for telephone poles and watercocks, miscellaneous street and sidewalk defects without purpose, and obstructions and stumbling blocks left on the roads and walks. So far as the law of torts is concerned, these things are here to stay. No judge has ever so much as intimated that municipalities, street companies, plumbers, and abutting property owners should investigate alternative methods of conducting their activities. So, the remaining question is the cost of preventive or protective measures and what they should be. Here again, the answer to this question is often assumed, though discussion of it is becoming more frequent.

In the blind cases, the issue has gradually narrowed to warning versus protection. When trenches, cellarways and holes are involved, must the defendant provide a barricade sufficient to stop and hold the blind pedestrian, or does he do enough if he supplies a contraption which would indicate to the pedestrian that danger lies ahead? No court in recent times has suggested that the defendant must station a workman at the spot. Two courts have taken a definite stand that an adequate warning was adequate.[240] Others leave the question of defendant's due care to the jury. In *Haley v. London Elec. Bd.*,[241] the Lords agreed that "In the exercise of reasonable care, local authorities and other public bodies are entitled to assume that if a blind man exercises his privilege of using a public footpath he will have been trained to protect himself from collisions by the use of his stick."[242] The guard is sufficient if it is of a nature such that the stick of a blind man properly being used would

[240] Masterson v. Lennon, 115 Wash. 304, 197 Pac. 38 (1921), Haley v. London Elec. Bd., [1965] A.C. 778 (1964).

[241] Haley v. London Elec. Bd., *supra* note 240.

[242] *Id.* at 799.

come into contact with it. It need not be so substantial that a blind man could not knock it over and "so be propelled into the excavation."[244] In their Lordships' informed opinion, "a light fence like a towel rail about two feet high,"[245] used by the post office department, will adequately serve this purpose. Their Lordships refused to overrule a case in which a blind woman, apparently not carrying a cane, walked into the Post Office light fence, pushed it ahead of her, fell into the hole beyond and was held guilty of contributory negligence.[246] Apparently, thus, in England, despite the talk about bringing the law up to date, the street-tampering defendant is entitled to assume that blind pedestrians will be trained in the use of a cane which they will carry, and that a light, moveable, rail fence will be detected by the cane user in time for him to stop. The holding of the *Haley* case goes no further than the facts of the case require; not nearly as far as the facts of life require. Only a minor fraction of the blind are trained and skillful in the use of the cane; a somewhat larger percentage, but still very small, use canes. What about the rest? Are they condemned to a life of ostracism? "One is entitled to expect of a blind person," said Lord Reid in the *Haley* case, "a high degree of skill and care because none but the most foolhardy would venture to go out alone without having that skill and exercising that care."[247] Many reasonable, prudent, blind people do just that. To do so is only as foolhardy as to choose to live in the world rather than become a vegetable in the back room of somebody else's home.

To speak of cost to the defendant in these situations is to speak of trifling sums, both in absolute terms and in the relation of money to social policy. To furnish barricades which would keep blind people out of trenches in the sidewalks and streets, said Lord Danning in the English court of appeals, would "be too great a tax on the ordinary businesses of life."[247] This has to be a figure of speech and not a serious financial calculation. The House of Lords in *Haley*, while accepting the principle of the court of appeals in this respect, yet found the necessary warning or protection devices to be very inexpensive.

In a 1920 Scottish case,[248] much quoted in *Haley*, consideration was given to financial factors. The blind cannot afford to hire attendants so they must be permitted on the streets without them.[249] The city allows them free passage on the tramway, indicating knowledge of their pres-

[244] *Id.* at 800.
[245] *Id.* at 790.
[246] Pritchard v. Post Office, 114 J.P. 360 (C.A. 1950).
[247] Haley v. London Elec. Bd., [1965] A.C. 778, 791 (1964).
[247] [1964] 2 Q.B. 121, 129 (1963).
[248] M'Kibbin v. Glasgow Corp., 57 Scottish L.R. 476 (1920).
[249] *Id.* at 594.

ence and their poverty.[250] No undue financial burden is placed on the city to guard watercock holes in the street. To require the city to pad the lampposts would be an undue burden.[251] All of this is to speak in absolute fiscal terms. It is to ignore the absolute fiscal cost, not to mention the incalculable social cost, of maintaining the blind in idleness. If all of the blind people capable of doing so were moved into the streets and into employment, more than enough money would be saved to pad all the lampposts, erect gold-plated padded barricades before every hole in the city, with enough left over to pay for a small war or two. The reason for not padding the lampposts is not financial. Nor is it the fact that they are common or ordinary street structures as the Scottish court said. It is that they are not very dangerous. They run up the cost of a blind man's band-aids but little more.

[250] *Id.* at 594
[251] *Id.* at 598

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CONSTITUTION

THE NATIONAL FEDERATION OF THE BLIND, INC.

as adopted November 16, 1940
amended 1942, 1944, 1946, 1949, 1951, 1952, 1953, 1958, 1960

ARTICLE I THE NAME

The name of this organization is The National Federation of the Blind.

ARTICLE II PURPOSE

The purpose of The National Federation of the Blind is to promote the economic and social welfare of the blind.

ARTICLE III MEMBERSHIP

Section a. Membership of The National Federation of the Blind shall consist of the members of the state affiliates plus members at large, who shall have the same rights, privileges, and responsibilities.

Under procedures to be established by the Executive Committee, any person denied admission by a state affiliate may be admitted as a member at large. The dues of members at large shall be one dollar per year.[1]

Section b. Each state or territorial possession of the United States, including the District of Columbia, having an affiliate shall have one vote at the national convention. Delegates to the national convention shall be elected not less frequently than every two years.[2]

Section c. Affiliates shall be organizations of the blind, controlled by

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[1] Section 'a' of Article III was amended July 4, 1960, Miami, Florida. Before the amendment Section 'a' read: "The membership of The National Federation of the Blind shall consist of delegations from each of the states of the United States and the District of Columbia and its Territorial possessions."

[2] Section 'b' of Article III was amended July 4, 1960, Miami, Florida. Before the amendment Section 'b' read: "Each state shall have one vote."

the blind.[3]

Section d. (1) The Executive Committee may admit one or more affiliates in those states which have no affiliate in June, 1951.

(2) The Executive Committee may admit more than one organization in those states which now have one affiliate with the consent of that affiliate. This section shall not apply to those states which do not have an affiliate.

(3) Where an affiliate refuses to consent to the admission of another organization as provided in the preceding section, that organization may be admitted by a three-fourths majority vote by the delegates present and voting at a regular convention, provided however, that this section shall not apply to organizations which are formed after June, 1951.

(4) In any state having two or more affiliates of The National Federation of the Blind:

aa. The state shall be entitled to one vote cast as a unit;

bb. The dues and voting strength shall be apportioned among the affiliates according to mutual agreement;

cc. In the absence of such mutual agreement, the dues and voting strength shall be apportioned equally among the affiliates.[4]

Section e. The convention by a two-thirds vote may expel and by a

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[3] Section 'c' of Article III was amended July 4, 1960, Miami, Florida. Before the amendment Section 'c' read: "Delegates shall represent organizations of the blind controlled by the blind; but individuals may be admitted to membership with all the privileges and duties of representative members except that they shall not be entitled to vote or hold office."

[4] Section 'd' of Article III added June 20, 1951, Oklahoma City, Oklahoma.

simple majority suspend, or otherwise discipline any member or affiliate for conduct inconsistent with this Constitution, the Affiliate Standards, or policies established by the convention; provided that notice of the proposed action shall be announced to the convention and to the party concerned on the preceding day.[5]

ARTICLE IV OFFICERS

Section a. The officers of The National Federation of the Blind shall consist of president, first vice-president, second vice-president, secretary and treasurer. They shall be elected biennially.

Section b. The officers shall be elected by majority vote of the states.

Section c. The National Federation of the Blind shall have an Executive Committee which shall be composed of the officers plus eight members selected in the same way, whose regular term shall be two years, all eight members to be elected under this system beginning in July, 1960, four for two years and four for one year.[6]

Section d. There shall be, in addition, a Board of Directors. The duties of the said Board shall be advisory only. The membership of the Board of Directors shall be the officers of the Federation, the elected members of the Executive Committee, and other blind persons, not to exceed twelve in number, who may be appointed, from time to time, by the Executive Committee, subject to confirmation by the Federation at the next ensuing annual meeting. When so con-

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[5] Section 'e' of Article III added July 4, 1960, Miami, Florida.

[6] Section 'c' of Article IV was amended July 4, 1960, Miami, Florida. Before the amendment Section 'c' read: "The National Federation of the Blind shall have an Executive Committee which shall be composed of the officers plus eight members selected in the same way whose regular term shall be four years but at the first election after the adoption of this amendment two of the new members shall be elected for one year and two for three years."

'Committee' was substituted for 'Board', July 15, 1962, Nashville, Tennessee.

Section 'c' of Article IV was previously amended June 22, 1949, Denver, Colorado. Before the amendment Section 'c' read: "The National Federation of the Blind shall have an Executive Board which shall be composed of the officers plus four members selected in the

firmed, such member of the Board of Directors shall serve for one year, or until their successors shall have been appointed by the Executive Committee.[7]

Section e. Officers, Executive Committee members, and members of the Board of Directors may be removed or recalled by a majority vote of the convention; provided that notice of the proposed action shall be announced to the convention and to the party concerned on the preceding day.[8]

Section f. No person receiving regular substantial financial compensation from The National Federation of the Blind shall be an elected officer or Executive Committee member.[9]

ARTICLE V

POWERS AND DUTIES OF THE CONVENTION, THE EXECUTIVE COMMITTEE AND THE PRESIDENT

Section a. Powers and Duties of the Convention.

The convention is the supreme authority of the Federation. It is the legislature of the Federation. As such, it has final authority with respect to all issues of policy. Its decisions shall be made after opportunity has been afforded for full and fair discussion. Delegates, members, and all blind persons in attendance may participate in all convention discussions as a matter of right. Any member of the Federation may make or second motions, propose nominations, serve on committees and is eligible for election to office, except that only blind members may hold elective office. Voting and making motions by proxy are prohibited. The convention shall determine the time and place of its meetings. Consistent with the democratic character of the Federation, convention meetings shall be so conducted as to

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same way whose regular term shall be four years but at the first election two shall be elected for two years."

[7] Section 'd' Article IV was added July 15, 1952, Nashville, Tennessee.

[8] Section 'e' Article IV was added July 4, 1960, Miami, Florida.

[9] Section 'f' Article IV was added July 4, 1960, Miami, Florida.

prevent parliamentary maneuvers which would have the effect of interfering with the expression of the will of the majority on any question, or with the rights of the minority to full and fair presentation of their views. The convention is not merely a gathering of representatives of separate state organizations. It is a meeting of the Federation at the national level in its character as a national organization. Committees of the Federation are committees of the national organization. The nominating committee shall consist of one member from each state affiliate represented at the convention.

Section b. Powers and Duties of the Executive Committee.

The function of the Executive Committee as the governing body of the Federation between conventions is to make policies when necessary and not in conflict with the policies adopted by the convention. Policy decisions which can be postponed until the next meeting of the national convention shall not be made by the Executive Committee. The Executive Committee shall serve as a credentials committee. It shall deal with organizational problems presented to it by any affiliate. At each meeting, the Executive Committee shall receive a report from the President on the operations of the Federation. There shall be a standing subcommittee of the Executive Committee which shall consist of three members. The committee shall be known as the Subcommittee on Budget and Finance. It shall, whenever it deems necessary, recommend to the Executive Committee principles of budgeting, accounting procedures and methods of financing the Federation program; and shall consult with the President on major expenditures.

The Executive Committee shall meet at the time of each national convention. It shall hold at least two other regular meetings each year if funds are available. Special meetings may be held either on the call of the President or on the written request of any five members.

Section c. Powers and Duties of the President.

The President is the principal administrative officer of the Federation. In this capacity his duties consist of: carrying out the policies adopted by the convention; conducting the day-to-day management of the affairs of the Federation; authorizing expenditures from the Federation treasury in accordance with and in implementation of the policies established by the convention; appointing all committees of the Federation except the Executive Committee; coordinating all activities of the Federation including the work of other officers and of committees; hiring, supervising and, when necessary, dismissing staff members and other employees of the Federation and determining their numbers and compensation; taking all administrative actions

necessary and proper to put into effect the programs and accomplish the purposes of the Federation.

The implementation and administration of the interim policies adopted by the Executive Committee is the responsibility of the President as principal administrative officer of the Federation.

Section d. Conflicting Provisions.

All provisions of the Constitution in conflict with this article are repealed.[10]

ARTICLE VI PROCEEDINGS

Roberts Rules of Order Revised shall govern all proceedings.

ARTICLE VII AMENDMENTS

The Constitution may be amended at any regular annual meeting of the Federation by an affirmative vote of two-thirds of the members registered, present and voting. Provided further: that the proposed amendment must be signed by five member states in good standing and that it must have been presented to the appropriate committee the day before final action by the convention.[11]

ARTICLE VIII FINANCE

All member states shall pay an annual assessment of ten dollars[12] per each one million population of its state, or major[13] fraction

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[10] The present Article V was adopted on July 5, 1958, Boston, Massachusetts. It is a substitute for Article V as it stood before.

[11] The clause reading: "Provided further: that the proposed amendment must be signed by five member states in good standing and that it must have been presented to the appropriate committee the day before final action by the convention" was added in June, 1942, Des Moines, Iowa.

[12] Assessment was changed from $15 to $10 in June, 1944, Cleveland, Ohio.

[13] The word 'major' was added July 12, 1953, Milwaukee, Wisconsin.

thereof, according to the last Federal census.[14]

Assessments shall be payable annually in advance, except that the Executive Committee shall have power to rule that member states may pay quarterly in advance, anything to the contrary in this Constitution notwithstanding.

Provided further: that any member state which is more than one year in arrears with its dues, shall be denied the privilege of voting.

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[14] The clause "and new members shall, in addition, pay an initiation fee of ten dollars" was repealed June 28, 1946, St. Louis, Missouri.

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THE NATIONAL FEDERATION OF THE BLIND

CODE OF AFFILIATE STANDARDS

As Adopted July 18, 1955

PREFACE:

Since the establishment of the National Federation of the Blind in 1940, many questions have arisen regarding the relationship between the Federation and its affiliates. These questions arise most frequently on the subject of organization and program standards within the respective state affiliates. Because many of these questions could not be directly answered, the Federation's executive committee in July of 1954 created this Committee on Affiliate Standards to make a study of this subject and to make recommendations which, if adopted by the convention, would serve as guides for affiliated organizations.

The Committee on Affiliate Standards is composed of:

Durward K. McDaniel, Chairman
Jacobus tenBroek
George Card
Clyde Ross, and
Kenneth Jernigan

The Committee met in Chicago at the end of October, 1954. The nature of the task requires that the product of the committee's work be made in the form of a Statement of Policy which will become official when and if it is adopted by a Federation convention.

STATEMENT OF POLICY APPLICABLE TO AFFILIATE STANDARDS

1. The National Federation of the Blind has grown from the base up, and by its structural nature is the sum of its component state affiliates. Independence, representation, and democracy are the fundamental qualities which inspired its formation and which justify its existence and growth. Since the Federation derives its existence by reason of its components, it follows that within the preservation of these qualities depends upon their existence within the Federation's affiliates. An affiliated organization of the blind should be independent of other organizations and interests, and it should be truly "of the blind." By this is meant an affiliated organization of the blind must be controlled by blind people themselves. "Control" does not require exclusion from membership of all persons who are not blind. Rather, control can best be measured by the leadership of the blind members within the organization who must exercise a dominant role

in the formulation and execution of program and policy.

Certainly, a majority of the members within an organization must be blind persons, and a higher ratio is recommended. Likewise, a majority of the members of an executive board must be blind persons. It is mandatory that the president and the vice-president, as executive officers, be blind.

2. Organizations of the blind frequently criticize programs and policies of agencies for the blind. It is increasingly true that blind persons from within our organizations are being employed by agencies for the blind. These persons should not be denied membership by reason of their employment. As a practical matter, however, a blind employee of an agency who has been elected to an executive officer may find it difficult, if not impossible, to represent forcefully the position or program of his organization when it is at variance with his employer's policy or desire. There is potential educational value in having both blind and sighted agency employees eligible for membership.

3. In order to more adequately fill its representative role, each organization should continuously strive through an organized plan to enlarge its membership. It should endeavor to inform unorganized blind people of its purposes and functions. The organized blind men and women within these organizations have found common bonds of philosophy and objectives. Our strength and effectiveness depends upon our ability to bring others within this common bond. It is much easier and more desirable to settle our differences of opinion as equal members within one organization than it is to compete publicly as rival groups.

Representation requires more than a membership. It requires that each organization of the blind formulate and actively present its program and criticism to its state legislature, to administrative boards and to public administrators. It is essential that each organization have a legislative committee, board or officer expressly charged with the responsibility for carrying out its legislative function. It is only through the Federation and its state affiliates that blind people can effectuate their programs and philosophy both at the state and national levels. The Federation's national program is formulated by the collective will of its affiliates. After the national program is formulated and implemented, the National Federation of the Blind must depend upon the active support of its state affiliates in order to successfully achieve the program objectives. It is only through the dedicated work and cooperation of members and organizations that the inferior, dependent ward status of the blind can be replaced by equality, dignity and right. Any enterprise or project

which is dedicated to the advancement of our common cause and to the achievement of first class citizenship for the blind deserves the support and active participation of all organizations of the blind.

4. Organizations of the blind should be managed and operated democratically. This standard requires adherence to the principle that the membership is the primary authority of the organization. Preferably, a general convention of the membership or elected delegates of the membership should be held annually. To assure democratic control, the membership of a state affiliate must meet and its principal executive officers must be elected at least once in every two years. There can be no closed memberships. Procedures for internal discipline should apply equally to each member.

Each organization must have a written constitution or by-laws setting forth the structure of the organization, the authority of its officers and representatives, and their terms of office.

5. Organizations of the blind have found that operating funds are necessary to carry on their constructive programs and projects. In the spending of contributed funds, no affiliate shall divide publicly contributed funds among its individual members on the basis of membership. Each affiliate must maintain adequate records of publicly contributed funds, and must be able to account for the expenditure of such funds in accordance with the stated purposes given in the solicitation of such funds.

6. Participation in and representation at the national conventions are important duties and functions of each affiliate. In recent years, the National Federation's greeting card sales program has resulted in the disbursement of considerable sums to its participating affiliates. Current prospects are that future disbursements will be much larger. Since such disbursements are more than adequate to send at least one representative from each participating affiliate, such representation at national conventions, commencing with 1956, shall be required as a condition precedent to each participating affiliate's right to its disbursement in the following year; provided that a deprived affiliate shall be entitled to an appeal to the Executive Committee or to the convention. An affiliated organization which fails to be represented at three consecutive national conventions may be considered to be inactive, and may be suspended as an affiliate by the Executive Committee.

7. The moneys disbursed by the Federation to its affiliates are received on a basis of representation made to the public. It is therefore made a condition precedent to such disbursement that the affiliates make a full report to the Federation of their use of these funds

and establish proper accounting procedures to be determined by the Executive Committee of the Federation.

As Amended July 4, 1960

Each state receiving greeting card funds must submit a complete report of what is done with greeting card money as well as other funds received by the affiliate; provided, that no action will be taken against an affiliate for failure to comply with this requirement without an opportunity for a fair hearing before the Executive Committee.

As Amended July 5, 1961

1. The affiliate must commit itself by resolution, bylaw or constitutional provision not to engage in any conduct or allow its officers or members to engage in any conduct inconsistent with the constitution of the NFB, its code of affiliate standards, its existence, progress and well-being.

2. The affiliate must give assurance by resolution, bylaw or constitutional provision that it will comply with the majority decisions of the Federation, on all policy issues. The affiliate must give a similar assurance that it will participate affirmatively in carrying out such policy decisions in the manner established by the NFB convention or pursuant to the directives of the duly elected officers of the Federation. The affiliate must give further assurance that it or its members will not obstruct the execution of such policies in any way.

3. The affiliate must commit itself not to indulge in any efforts to alienate members of Congress or other public officials from the Federation or any of its duly established policies and programs.

4. The affiliate must commit itself not to indulge in attacks upon the officers, committeemen, leaders and members of the Federation or upon the organization itself outside of the organization, and must not allow its officers or members to indulge in such attacks. This commitment in no way interferes with the right of an affiliate or its officers or members to carry on a political campaign inside the Federation for election to office.

5. The affiliate must commit itself not to interfere with the organizing activities of the Federation or the affiliates of the Federation.

6. The affiliate must commit itself not to join or support, or allow its officers or members to join or support any permanent or temporary organization inside the Federation, which has not received the sanction and approval of the Federation. This general proposition means, for example, that the Free Press Association must be dissolved insofar as it is composed of or supported by affiliates of the Federation or officers or members of affiliates of the Federation.

7. Each suspended affiliate must submit such financial records as may be required by the Subcommittee on Budget and Finance.